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EDITOR'S NOTE

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No. 86-772-CFX
Status: GRANTED

Title: City of St. Louis, Petitioner
v.
James H. Praprotnik

Docketed:
November 13, 1986

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Bush, Julian L., Wilson, James J.

Counsel for respondent: Oldham, Charles R.

Entry	Date	Note	Proceedings and Orders
1	Nov 13 1986	G	Petition for writ of certiorari filed.
2	Dec 12 1986		Brief of respondent James H. Paprotnik in opposition filed.
3	Dec 17 1986		DISTRIBUTED. January 9, 1987
4	Jan 12 1987		Petition GRANTED.
			**
6	Jan 27 1987		Order extending time to file brief of petitioner on the merits until March 13, 1987.
7	Feb 13 1987		Record filed.
8	Feb 13 1987		Certified copy of original record and proceedings, 14 volumes, received.
9	Feb 26 1987		Joint appendix filed.
10	Mar 4 1987		Order further extending time to file brief of petitioner on the merits until March 27, 1987.
11	Mar 27 1987		Brief of petitioner St. Louis filed.
12	Mar 27 1987		Brief amicus curiae of Little Rock filed.
13	Mar 27 1987		Brief amicus curiae of Internatl. City Management, et al. filed.
15	Apr 16 1987		Order extending time to file brief of respondent on the merits until May 18, 1987.
17	May 4 1987		Order extending time to file brief of respondent on the merits until June 1, 1987.
18	May 18 1987		Brief amicus curiae of AFL-CIO, et al. filed.
19	May 29 1987		Order further extending time to file brief of responden on the merits until June 5, 1987.
20	Jun 5 1987		Brief of respondent James H. Paprotnik filed.
21	Jul 2 1987		CIRCULATED.
22	Jul 20 1987		SET FOR ARGUMENT. Wednesday, October 7, 1987. (1st case).
23	Aug 28 1987	X	Reply brief of petitioner St. Louis filed.
24	Oct 7 1987		ARGUED.

PETITION
FOR WRIT OF
CERTIORARI

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86-772

Supreme Court, U.S.
FILED
NOV 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,
Petitioner,

VS.

JAMES H. PRAPROTNIK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether principles of causation applicable to actions brought against officials and local governments pursuant to 42 U.S.C. §1983 differ such that a judgment may be rendered against a local government despite the return of a verdict exonerating the local official who was alleged to have promulgated the unconstitutional policy and acted pursuant to that policy?

2. Whether the failure of a local government to establish an appellate procedure for the review of officials' decisions which does not defer in substantial part to the original decisionmaker's decision constitutes a delegation of authority to establish final government policy such that liability may be imposed on the local government on the basis of the decisionmaker's act alone, when the act is neither taken pursuant to a rule of general applicability nor is a decision of specific application adopted as the result of a formal process?

PARTIES BELOW

The parties in the Court of Appeals were the City of St. Louis, defendant and appellant, and James H. Praprotnik, plaintiff and appellee.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,
Petitioner,

VS.

JAMES H. PRAPROTNIK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Comes now the City of St. Louis, petitioner, and respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit filed in this case August 19, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was filed August 19, 1986, and is reported as *Praprotnik v. City of St. Louis,* 798 F.2d 1168 (8th Cir. 1986).

JURISDICTION

The judgment of the Court of Appeals was filed August 19, 1986. The petition for rehearing was denied September 19, 1986. Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amdt. XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"), 17 Stat. 13, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This action originated on February 8, 1983 with the filing of a complaint by respondent James H. Praprotnik, alleging claims arising under 42 U.S.C. §1983. Jurisdiction in the District Court was predicated on 42 U.S.C. §§1331, 1343. Unless otherwise noted, the facts stated herein are drawn from the opinion of the Court of Appeals. References are to that opinion, as reproduced in the appendix.

Respondent Praprotnik was an employee of the City of St. Louis, commencing in 1968. In 1980 he was assigned to the City's Community Development Agency (CDA). Praprotnik became embroiled in several disputes with his supervisors at CDA, beginning in 1980, and successfully appealed several adverse employment decisions to the City's Civil Service Commission. In the Spring of 1982, Frank Hamsher, the new director of CDA, transferred Praprotnik to the City's Heritage and Urban Design Commission. Praprotnik attempted to appeal Hamsher's decision, but the Commission declined to hear the appeal on the ground that the lateral transfer caused him no injury. Appendix A, A-2-4.

Henry Jackson, Praprotnik's supervisor, decided to perform himself the architectural duties that had been intended to be part of Praprotnik's new assignment. Despite Praprotnik's dissatisfaction with the way his new assignment had worked out, he remained in the new position until December of 1983, when he was laid off as part of a departmental reorganization plan adopted by Robert Killen (Jackson's replacement), and Thomas Nash, the City's Director of Public Safety and Killen's supervisor. *Id.* A-4.

Praprotnik had filed suit against the City and city officials Charles Kindleberger, Frank Hamsher, Deborah Patterson and Henry Jackson on February 8, 1983, after the Civil Service Commission had dismissed his appeal of his transfer. After his layoff, he appealed that action to the Civil Service Commission (where it remains pending to this day), and he amended his complaint to include the layoff as an additional constitutional violation, and to delete Henry Jackson. *Id.* A-5-6.

A five-day jury trial commenced on January 13, 1984. Each and every one of the individual defendants was exonerated; nonetheless, the jury returned verdicts against the City awarding Praprotnik $15,000 to compensate him for a first amendment violation, and another $15,000 for the violation of his due process rights. *Id.* A-6. On January 19, 1984, the Court entered judgment for $30,000 in favor of Praprotnik and against defendants. *Id.* A-28-29. Following the denial of the City's post-trial motion, the City filed its Notice of Appeal with the United States Court of Appeals.

On August 19, 1986, the Court of Appeals filed its opinion. The majority reversed the judgment on the due process count, finding that the verdict thereon was either an improper duplication of damages on the First Amendment claim, or an award of damages for a due process violation where no substantive claim is cognizable. *Id.* A-17-18. The verdict on the First Amendment claim was sustained. The majority believed that there was sufficient circumstantial evidence such that a rational jury could reasonably have concluded that Hamsher's transfer of Praprotnik was substantially motivated by Praprotnik's exercise of rights to appeal to the Civil Service Commission. *Id.* A-13-14. The transfer, in turn, was considered to be the cause of his ultimate layoff because, the court believed, the conditions at Praprotnik's new assignment were so odius as to have constituted a constructive discharge, despite the fact that plaintiff successfully endured the new assignment for a year and a half, and appealed his layoff from that position. *Id. A-14.*

This Court decided the cases of *Pembaur v. Cincinnati,* 475 U.S. ____, 89 L.Ed.2d 452 (1986) and *City of Los Angeles v. Heller,* 475 U.S. ____, 89 L.Ed.2d 806 (1986), after the briefs had been filed. The majority relegated its discussion of these important cases to two footnotes. *Pembaur* was blandly cited as approving of the approach the Court of Appeals in *Williams v. Butler,* 746 F.2d 431 (8th Cir. 1984), which had been vacated and affirmed by an equally divided court, 762 F.2d 73 (8th Cir. en banc 1985). *Id.* A-8.[1] *Heller,* which involved a very similar procedural problem, was distinguished on the basis that Hamsher had not directly caused plaintiff's layoff and consequent damages. *Id.* A-6-7.

Judge Ross dissented from the judgment of the panel majority. Judge Ross' dissent placed significant reliance upon *Pembaur.* Noting the language in *Pembaur* that employment decisions are not city policy absent a delegation to the official making the decision of the authority to make City policy regarding that area of decision-making, Judge Ross found that "appointing authorities" such as Hamsher lacked the authority to establish employment policy for the City, and that the existence of the Civil Service appeal process which Praprotnik had repeatedly used with success was such that Hamsher did not have final authority over the employment decision. *Id.* A-21-23. Moreover, Judge Ross doubted that there was sufficient evidence to support a finding that Hamsher had transferred Praprotnik in retaliation for his appeal to the Civil Service Commission. *Id.* A-24-25.

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[1] This Court vacated *Williams* on April 7, 1986 for reconsideration in light of *Pembaur,* 89 L.Ed.2d 909, 106 S.Ct. 1508 (1986). On September 26, 1986 the Court of Appeals filed a new opinion, once again affirming the judgment by a vote of seven to five. The majority included the votes of two senior judges. Judge Ross, on behalf of the five dissenting judges, vigorously arged that "The decision is entirely unsupported" in light of *Pembaur.* See *Williams v. Butler,* No. 83-2534, No. 83-2641, slip. op. at 13 (8th Cir., Sept. 26, 1986) (en banc). The argument put forward by Judge Ross on behalf of the dissenting judges in *Williams* parallels his dissent in the case at bar, and his analysis of *Pembaur* is remarkably similar to the argument we put forward below.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Court should grant this application for a writ of certiorari because the judgment of the Court of Appeals is in conflict with this Court's opinion in *City of Los Angeles v. Heller,* 475 U.S. ____, 89 L.Ed.2d 806 (1986); because the judgment of the Court of Appeals conflicts with the opinions of this Court on the criteria for imposing 42 U.S.C. §1983 liability on municipalities contained in *Oklahoma City v. Tuttle,* 471 U.S. ____, 85 L.Ed.2d 804 (1985); and *Pembaur v. Cinncinnati,* 475 U.S. ____, 89 L.Ed.2d 452 (1986); because the opinion is inconsistent with the opinions of several courts of appeal, and because the development of the law regarding municipal liability under 42 U.S.C. §1983 is an important matter of federal law which should be further settled by this Court.

1. The Court's judgment against the City of St. Louis is inconsistent with the jury's verdict exonerating the city official claimed to have established the unconstitutional policy and to have engaged in the unconstitutional act taken pursuant to that policy. If the city official is exonerated because the constitutional injury was unforeseeable, the City must likewise be exonerated.

In *City of Los Angeles v. Heller,* 475 U.S. ____, 89 L.Ed.2d 806 (1986), plaintiff sued two city police officers and the city pursuant to 42 U.S.C. §1983 claiming that the officers had unlawfully arrested him, pursuant to a City policy. A bifurcated trial was had, and the jury returned a verdict in favor of the individual police officers finding that the officers had not committed an unconstitutional arrest. This Court upheld the District Court's dismissal of the action against the city, finding that none of its "cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when-in fact the jury has concluded that the officer inflicted no constitutional harm." *City of Los Angeles v. Heller,* 89 L.Ed.2d at 805-806. In the case at bar, the jury concluded that the various City officials involved in Praprotnik's transfer, including Frank Hamsher, did not inflict a constitutional harm upon Praprotnik. Nevertheless, both the District Court and the Court of Appeals have allowed the verdict against the City to stand, despite its patent incompatibility with *Heller.*

The rationale by which the panel majority evades *Heller* is that the City's liability in *Heller* was "solely derivative of the conduct of the named individual defendants" while in the case at bar persons other than Hamsher "effected city policy in laying Praprotnik off", thereby causing Praprotnik's injury. *Id.* A-6. The verdict against Hamsher is deemed to reflect the jury's finding that he did not "directly" cause plaintiff's injury. *Id.* A-7.

Without seemingly realizing it, the Court's technique for evading *Heller* causes its opinion to be in conflict with other opinions of this Court. The Court of Appeals is, of course, correct in its assumption that Hamsher cannot be held liable for injuries that his act did not proximately cause. This Court has long held that the principles of forseeability developed in connection with the law of torts generally is equally applicable to the species of constitutional tort that §1983 constitutes. See *Monroe v. Pape,* 365 U.S. 167, 187 (1961) ("Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actiona."); *Martinez v. California,* 444 U.S. 277, 285 (1980) ("decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal law."). In *Oklahoma City v. Tuttle,* 471 U.S. ____, 85 L.Ed.2d 804 (1985), the opinions of both Justice Rehnquist, *id.* at 806, and Justice Brennan, *id,* 85 L.Ed.2d at 810, n. 9, emphasize that cities too cannot be held liable for the remote unforeseeable consequences of their policies. Thus, if the decision of Nash and Killen (or Jackson's decision to himself perform the architectural duties that were to have been Praprotnik's) was a superceding cause such that

Hamsher is not liable for the damages his decision remotely caused, the City likewise cannot be held liable for injuries caused by the policy that the Court of Appeals believed Hamsher's decision constituted.

Thus, the Court of Appeals' decision is inconsistent with *Heller* because the City cannot be held to have caused an unconstitutional injury where the City employee who is claimed to have formulated and implemented the unconstitutional policy is exonerated. It is therefore inconsistent with opinions of other Courts of Appeals which have conscientiously applied *Heller*. See *Palmerin v. City of Riverside*, 794 F.2d 1409 (9th Cir. 1986).[2] The Court's attempt to evade *Heller* is inconsistent with this Court's opinion in *Oklahoma City*, to the effect that the same principles of proximate causation that are applicable to natural persons are equally applicable to municipal corporations in §1983 cases. Indeed, so blatant are the inconsistencies that this case is appropriate for summary reversal pursuant to Rule 23 of this Court.

2. The judgment of the Court of Appeals is inconsistent with the views of municipal liability expressed by this Court in that it imposes liability on a city on the basis of a decision made by a city employee: 1) who was not delegated the power to establish final governmental policy in the area; 2) who did not act pursuant to a rule of general applicability established by official action; and 3) who did not act pursuant to a formal process.

1. Since this Court held that 42 U.S.C. §1983 liability might be imposed upon a local government when its policies are the moving force causing injury to constitutional rights in *Monell v.*

New York City Dept. of Social Services, 436 U.S. 658 (1978), the difficult task of defining those policies for which the local government may be held liable has occupied this Court and the circuit courts of appeals. This Court has not yet adjudicated a case in which a definition has been unambiguously endorsed by a majority of its members, and the courts of appeals have been divided. A particular controversy has raged as to the application of *Monell* to situations where an employee makes a decision that is not subject to review by other municipal officials. One view has it that the local government in such circumstances is liable on the theory that such acts might be fairly said to represent official policy. See *Rookard v. Health & Hospitals Corp.*, 710 F.2d 41 (2nd Cir. 1983); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981); *Wellington v. Daniels*, 717 F.2d 932 (4th Cir. 1983); *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983); *Williams v. Butler*, 746 F.2d 431 (8th Cir. 1984), aff'd by equally divided court, 762 F.2d 73 (8th Cir. en banc 1985); *Berdin v. Duggan*, 701 F.2d 909 (11th Cir. 1983). On the other hand, the Fifth Circuit has refused to hold a city liable for the acts of its officials, even where the officials have been the final authorities on the decisions in question, where the local government has not appointed the official to act in its place. *Bennett v. Slidell*, 728 F.2d 762 (5th Cir. en banc 1984). See also *Rowland v. Mad River Local School District Montgomery County, Ohio*, 730 F.2d 444 (9th Cir. 1984). Petitioner submits that the former view, relied upon by the Court of Appeals in the case at bar, is inconsistent with the recent pronouncements on the issue by this Court in *Pembaur v. Cincinnati*, 475 U.S. ____, 89 L.Ed.2d 452 (1986). Thus, the grant of this petition would serve the important interests of maintaining conformity between the opinions of this Court and inferior federal courts, and serve to clarify the Court's position on this important federal question.

There are essentially two views of municipal policy contained within the *Pembaur* decision. First there is the view of municipal policy contained in Part II-B of Justice Brennan's opinion, one in which Justices Marshall and Blackmun concur.[3] As Justice Brennan sees the matter, a policy is made where "a deliberate choice is made from among various alternatives by the officials responsible for establishing final policy with respect to the subject matter in question." *Id,* 89 L.Ed.2d at 465. Justice Brennan's view recognizes that unconstitutional acts of even policymakers are not ipso facto municipal policy, for it is necessary "that the unconstitutional act was taken *pursuant* to a municipal policy rather than simply resulting from such a policy in a 'but for' sense." *Id,* 89 L.Ed.2d at 464-465, n. 10 (emphasis in original). Critical to the Brennan analysis is identification of the "subject matter in question" or "activity." *Id,* 89 L.Ed.2d at 465. This is well illustrated in footnote 12 of Justice Brennan's opinion which, as Judge Ross' dissent correctly points out, is directly applicable to the case at bar. According to footnote 12, the identification of the particular subject matter in question takes place at a level of abstraction considerably beyond that of an individual hiring or firing decision; rather, the subject matter in question is defined as broadly as county employment policy. An individual hiring and policy decision does not become local government policy merely because the local government gives a particular employee discretion to make that decision; rather, the individual employment decision is transmuted into government policy only where the government has "delegated its power to establish final employement policy" to the particular decision maker.

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[2] It is even inconsistent with the opinion of another Eighth Circuit panel which recognizes, even without the authority of *Heller*, that a city cannot be held liable where a jury returns a verdict in favor of the city's agent. See *Hannah v. City of Overland, Mo.*, 795 F.2d 1385, 1392 (8th Cir. 1986).

The opinion of the Court of Appeals in the case at bar concludes that Hamsher's decision was the City's policy on the basis of *Williams v. Butler, op. cit.* 746 F.2d 431 (8th Cir. 1984), and, in particular, that portion of the *Butler* test that held that "if a decision made within the scope of the official's

authority may fairly be said to end the matter, then the acts of the official may fairly be said to be those of the local governing body." Appendix A-8. The Court then embroiders upon *Williams* by finding that the official's authority may be fairly said to end the matter where the City fails to provide an appeals process in which the appellate body does not defer in substantial part to the judgment of the original decisionmaker. *Id.* A-11.

The panel opinion can be reconciled with Justice Brennan's opinion in *Pembaur* only if the failure to provide a process by which an employee's decisions may be reviewed by an appellate body not deferring in substantial part to the original decision maker's decision constitutes a delegation of the authority to establish final government policy in that area. Such an interpretation would fly in the face of common sense. On any given day, employees of a major city make literally tens of thousands of deliberate choices of whether to follow a course of action among alternatives. An assistant city counselor decides whether he will make argument A rather than B in the brief he is preparing; another city attorney decides to strike juror A rather than juror B from the panel; a sanitation worker chooses to collect garbage on the north side of the street rather than the south side of the street; the counter clerk decides that she will wait on citizen A rather than citizen B, when both arrive at herncity office at the same time; the school teacher decides that she will teach spelling in the morning rather than the afternoon; the police officer determines how much force is necessary to effectuate a particular arrest; and on and on. In none of the cases is there an appeals process, let alone one that does not show substantial deference to the original decision maker. In no common understanding of the term have any of these persons made a policy on behalf of the City. And so it is with employment decisions. If the City's Board of Aldermen or Civil Service Commission had made a decision that all employees who file appeals of employment actions should be disciplined, that would be City policy. If either body were to decide that Mr. Praprotnik, and Mr. Praprotnik alone, should be disciplined for filing a particular civil service appeal, that would be City policy. Or even if those bodies should decide that they would not adopt policy on retaliatory firings, but rather that Mr. Hamsher should establish the City's policy regarding whether employees should suffer retaliation for filing Civil Service appeals, that would be City policy. None of these things happened here. Hamsher was left the discretion to make an employment decision; he is supposed to have exercised that discretion unlawfully (although the jury did not so find), but Hamsher's exercise of his discretion does not represent City policy in the absence of the delegation of the power to him to make City policy on retaliation. The failure to provide an appeals process encumbered with a particular standard of review does not constitute a delegation of power. The Court's opinion is inconsistent with Justice Brennan's view in *Pembaur;* and it is inconsistent with *Tuttle,* where the City was exonerated even though it had no appeals process by which it could access and review the amount of force its police officers use in making arrests.

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[3] These views are also expressed in Justice Brennan's concurring opinion in *Oklahoma City v. Tuttle,* op. cit., 85 L.Ed.2d 805-810, in which Justices Marshall and Blackmun concurred.

2. *Pembaur* contains another view of municipal policy which is an alternative to that put forward by Justice Brennan. Justice Powell's dissent identifies policy as limited to: (a) rules of general applicability established by official action; or (b) decisions of specific application adopted as the result of a formal process.[4] *Id.,* 89 L.Ed.2d 475-476. Though only Justice Rehnquist and Chief Justice Burger joined in Justice Powell's dissent, both Justice White and Justice O'Connor joined in the judgment only because they believed the prosecutor's advice was made to effectuate a pre-existing county policy authorizing forcible entries on third-party property. 89 L.Ed.2d at 466 and 470. Thus, Justice Powell's analysis might be fairly said to represent the views of a majority of the membership of the

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[4] Justices Brennan, Blackmun and Marshall agree that policy is made under those circumstances. See *Pembaur,* op. cit., 89 L.Ed.2d 463-464.

Supreme Court.[5] No extended analysis of the facts in the present appeal is necessary if the Powell view is employed; there was simply no evidence that the City of St. Louis had a rule of general applicability that employees who filed appeals of employment decisions to the City's Civil Service Commission would be subjected to sanctions, and it is equally plain that the City did not transfer plaintiff as a result of a formal decision making process. Thus, the panel opinion is inconsistent with the views of a majority of the justices sitting on the Supreme Court, as expressed in the opinions in *Pembaur.*

3. The principle upon which the Court of Appeals decided the case - that a city delegates final policy making authority where it vests discretionary authority to make decisions in its employees, but fails to provide an appeals mechanism which does not defer in substantial part to the judgment of the original decision maker - is one that will render the overwhelming majoring of decisions made by City employees city policy. Indeed, while a large bureaucratic municipal corporation such as the City of St. Louis does have the machinery in place that will prevent occasional decisions of City employees from being converted into City policy,[6] it is likely that in most cities all decisions of city employees will become city policy. The doctrine that cities cannot be held liable on the basis of respondeat superior will survive, but its meaningful application will be rare indeed.

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[5] Similar views were also expressed in Justice Rehnquist's opinion in *Tuttle,* in which Chief Justice Burger, Justice White and Justice O'Connor joined. Justice Powell did not participate.

[6] For example, the Civil Service Commission reviews certain employment decisions, and the Board of Adjustment reviews certain zoning decisions.

CONCLUSION

For the foregoing reasons, certiorari should issue to the Court of Appeals for the Eighth Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-1145, 85-1267, 85-1268

James H. Praprotnik,
Appellee,

v.

City of St. Louis, a municipal corporation,
Appellant.

Frank Hamsher; Charles Kindleberger,
Community Development Agency; and
Deborah Patterson, Community
Development Agency.

Appeals from the United States District Court
for the Eastern District of Missouri.

Submitted: January 13, 1986

Filed: August 19, 1986

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, and ROSS, Circuit Judge.

LAY, Chief Judge.

The City of St. Louis (City) appeals from a jury verdict finding the City liable under 42 U.S.C. § 1983 for depriving James

Praprotnik, a laid-off City employee, of his constitutional rights. The jury found (1) that Praprotnik had been penalized for exercising his first amendment rights, and (2) that his lay off had been motivated by improper reasons, depriving him of due process of law. We face a complicated appeal brought by the City made difficult by confusing, bifurcated instructions requested by both parties, the use of two special verdicts for the same damages, and rather conclusory arguments made by both sides on appeal. We affirm in part, reverse in part, and remand for reconsideration of the amount awarded in attorney fees.

Praprotnik was a City employee from 1968 until he was laid off on December 30, 1983. In 1980, Praprotnik held a management position in the Community Development Agency (CDA) as an architect when he became embroiled in a dispute with his superiors. Charles Kindleberger, Praprotnik's immediate supervisor, suspended Praprotnik for fifteen days as a result of this dispute. Praprotnik appealed his suspension to the City civil service commission pursuant to civil service rules. Praprotnik's co-workers testified at trial that Praprotnik's job responsibilities were reduced and his work transferred to other employees with less experience during this period. One employee testified that there was a change in management attitude toward Praprotnik from the time he appealed his suspension. The commission determined that Praprotnik's suspension was unreasonable and excessive, and Praprotnik was reinstated with back pay.

Approximately two weeks before Praprotnik was suspended, and several days before the dispute arose, Kindleberger recommended Praprotnik for a two-grade, "super step" increase, based on Praprotnik's superior performance. In October 1980, after the dispute, Praprotnik was reviewed again. This time, Kindleberger rated Praprotnik "good" overall, but recommended a two-step *decrease* in salary grade. When Praprotnik asked Kindleberger the reasons for the salary decrease, Kindleberger said that Donald Spaid, Kindleberger's own supervisor and the department director, believed that Praprotnik had not been fully honest in the course of the hearings before the commission and that Spaid was "down on" Praprotnik. Upon Praprotnik's appeal of the two-step decrease, he was awarded a one-step increase, overturning Kindleberger's recommendation.

When Praprotnik's annual review was again performed in October 1981, he was rated "adequate" in several categories and "inadequate" in "relationships." Prior to Praprotnik's suspension appeal, Praprotnik had never received a rating lower than "good." A confidential memorandum from one of Praprotnik's raters, Al Karetski, to Kindleberger recited the factors contributing to the "inadequate" rating for "relationships:"

> Relationships which Jim [Praprotnik] had with other employees, subordinates and superiors presented difficulties. For example, he did not relate well to the previous Director of the Agency [Spaid], who expressed that he should be fired, that he [Praprotnik] was "sabotaging" the department and that he could not be trusted.

Praprotnik again appealed the rating, resulting in a ruling that Praprotnik's "inadequate" rating for "relationships" be raised to an "adequate" rating.

In the spring of 1982, major staff and budget reductions were made in Praprotnik's agency. At that time, Praprotnik had seniority over two other employees in the agency in his job classification. At the same time, the City's Heritage and Urban Design Division (H.& U.D.), headed by Henry Jackson, had commenced a search to fill a position of far lesser responsibility and salary than Praprotnik's job. The new director of the CDA, defendant Frank Hamsher, proposed that some of Praprotnik's duties be transferred and consolidated with the vacant position at H.& U.D. to create a position classified at a grade equivalent to Praprotnik's. Henry Jackson, as well as Jackson's superior, Thomas Nash, agreed to the consolidation of functions.

Praprotnik was then informed that he would be transferred to H.& U.D. Hamsher told Praprotnik that this was to be a lateral transfer of personnel and job functions. Praprotnik objected to the transfer and attempted to appeal the decision. The civil service commission declined to hear the appeal, however, on the ground that Praprotnik had lost nothing by the transfer, even though Praprotnik thereby forfeited his seniority for lay-off purposes since he became the only employee in his job classification at H.& U.D.

Praprotnik soon became very unhappy in his new job at H.& U.D. Although his architectural duties had purportedly transferred with him, Jackson apparently took those duties over himself, and left Praprotnik to perform clerical functions. In November 1982, Praprotnik was given his first service rating in the new job. Jackson rated him "inadequate" overall, and indicated that Praprotnik was no longer in a management position, that he was "grossly overqualified," and that his position should be reclassified. Jackson also recommended that Praprotnik's salary be decreased by one step.

Praprotnik again appealed his rating to the service rating appeal board. The appeal board raised each of Jackson's "inadequate" ratings to "adequate", and reversed the pay reduction recommendation. In the meantime, however, Praprotnik's position was reclassified to a lower grade, and Jackson's replacement, Robert Killen, admitted that by July 1983, plans were being made to lay Praprotnik off.

These plans came to fruition on December 23, 1983, when Praprotnik received notice that he would be laid off effective December 30, 1983. The timing of the lay off imposed an unusually heavy burden on Praprotnik personally. Not only was it the holiday season, but Praprotnik had just the day before been released from the hospital following surgery. The lay off meant that he lost his income, as well as over 500 hours of accumulated sick leave and all other pension and vacation benefits, and that his medical insurance was cancelled. The reason given for his lay off was lack of funds.

Thomas Nash, the director of public safety and in charge of H.& U.D., further testified at trial as to the reason for Praprotnik's lay off. Nash stated that the work load at H.& U.D. was too heavy for the existing number of staff and that he could pay two lower level people out of Praprotnik's salary. Nash also stated that Praprotnik was laid off because of his performance. He did not consider downgrading Praprotnik as a possible budgetary solution.

Nash also explained the bureaucratic procedure involved in effecting the lay off. The recommendation for the lay off had to come from Nash initially. The mayor's office would have also been informed, but Nash characterized Praprotnik's lay off as a "minor reorganization" not requiring direct discussion with the mayor's office. William Duffe, the director of personnel, further explained the lay-off process. According to Duffe, lay offs are "made when the appointing authority determines there is a lack of work or a lack of funds within his agency." A department head desiring a reduction in force by lay off would first communicate the need to the personnel director. The personnel director would then provide a lay-off list to the department head, indicating which employees were subject to lay off and in what order.

Praprotnik appealed his lay off to the civil service commission. Under the City charter, employees may be laid off only for lack of work or lack of funds, and reorganization by itself is not a proper basis for lay off. Praprotnik's appeal of his lay off to the civil service commission is still pending, however, apparently because Praprotnik filed this lawsuit before his lay off occurred and the civil service commission has stayed its proceedings until a final decision on the entire matter is rendered by the courts.[1]

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[1] Praprotnik originally brought this suit on February 8, 1983, after his transfer, when the civil service commission dismissed his appeal on

Praprotnik's suit alleged that his transfer and lay off were improperly motivated by certain City supervisors[2] (1) in violation of his first amendment right to pursue his grievance from the suspension and (2) in violation of his due process rights. The jury returned two forms of special verdict finding the City liable under both theories and assessing damages for $15,000 for the first amendment violation and another $15,000 for the due process violation. In each instance, however, the jury exonerated the individual defendants.[3] The City appeals.[4] We affirm the verdict based on the City's retaliatory conduct against Praprotnik; we vacate the verdict based on the due process claim.

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that matter. In his original complaint, Praprotnik named the City, Charles Kindleberger, Frank Hamsher, Deborah Patterson, and Henry Jackson as defendants, and alleged that each personnel action taken against him was unconstitutional. After his lay off, he amended his complaint to include the lay off as an additional constitutional violation and deleted Henry Jackson as a defendant, presumably because Jackson had left city employment and had moved outside the jurisdiction.

[2] Specifically, he named Frank Hamsher and Charles Kindleberger, his supervisors in the CDA at the time of his transfer, and Deborah Patterson, the head of the CDA at the time of his lay off, as individual defendants.

[3] A preliminary issue is raised by the City as to whether the per curiam decision in *City of Los Angeles v. Heller*, 106 S. Ct. 1571 (1986), precludes Praprotnik's recovery against the City by reason of the jury's finding the individual defendants not liable. In *Heller*, a similar issue arose in an action involving an allegedly unlawful arrest made by a Los Angeles police officer. The plaintiff sued both the individual officer and the city, but a bifurcated trial was held in which the claim against the individual officer was considered first. The jury returned a verdict for the police officer, although no good faith defense instruction had been submitted. The district court then dismissed the claim against the city. The Supreme Court agreed that this was the proper course because "the jury [had] concluded that the officer inflicted no constitutional harm." *Heller*, 106 S. Ct. at 1573.

Heller is, however, distinguishable from the present case. Crucial to the result in *Heller* was the fact that the city's liability, if any, was solely derivative of the conduct of the named individual defendant. *Id.* Here, persons other than the named defendants, namely, Thomas Nash and Robert Killen, effected city policy in laying Praprotnik off and thereby brought to fruition Praprotnik's ultimate injury. The failure of the jury to find the individual named defendants responsible for Praprotnik's damages can be justified by the fact that the named defendants were not the supervisors directly causing the lay off, when the actual damages arose. Under one of the court's instructions, the jury was told to find the named individuals liable only if they were personally involv[illegible] in the lay off. It was error to give this instruction because there [illegible] no evidence to show that the named defendants were ever inv[illegible] in the actual decision to lay Praprotnik off. Under this erroneous instruction, though, it is easily understood why the jury returned verdicts for the named defendants and yet found the City liable.

We also note that the court in another instruction states that the named defendants must have been involved in the transfer "and/or" the lay off. The phrase "and/or" has been dubbed an "ugly device, " H.W. Fowler, A Dictionary of Modern English Usage 29 (E. Gowers 2d ed. 1983), said to "destroy[] the flow and goodness of a sentence" and "[u]seful only to those who need to write diagrammatically or enjoy writing in riddles." W. Strunk & E.B. White, The Elements of Style 34 (1959). The term "kills the plain sense of [] words formerly deemed adequate by the layman," W. Follett, Modern English Usage 64 (J. Barzun ed. 1966). and is commemorated in the couplet:

> Had he foreseen the modern use of *and/or* It would have sickened Walter Savage Landor.

Id. at 65.

The City further argues that Praprotnik failed to argue Nash's and Killen's role in the lay off to the jury, and therefore may not rely on this theory on appeal. We find that this theory was raised at trial. Evidence was offered to support Praprotnik's closing argument that:

> Who made the decisions about the layoff?
>
> One was Mr. Nash, who is the director of department of public safety. He's in the mayor's cabinet. He speaks — he's a high government official.
>
> Who else made that decision? A Mr. Killen who is the commissioner of Heritage and Urban Design. He's a high government official.

[4] The City argues for the first time on appeal that we should abstain from exercising jurisdiction over this matter on *Pullman* principles. *See Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500-501

Identity of municipal policymakers effecting Praprotnik's transfer and lay off.

The City's principal challenge to the verdict raises the propriety of the jury's implicit finding that Praprotnik's injury was brought about by an unconstitutional city policy, a requisite for municipal liability under *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 691 (1978). *See also Pembaur v. City of Cincinnati,* 106 S. Ct. 1292 (1986); *City of Oklahoma City v. Tuttle,* 105 S. Ct. 2427 (1985). We adopt the analysis made in this court's decision in *Williams v. Butler,* 746 F.2d 431 (8th Cir. 1984) (reheard en banc, May 14, 1986) in determining whether Praprotnik's lay off and transfer were acts of city policy. *Williams* recites that:

> (1) if, according to a policy or custom established by a governing body, an official is delegated the authority, either directly or indirectly, to act on behalf of a governing body; and (2) if a decision made within the scope of the official's authority ends the matter, then the acts of the official may fairly be said to be those of the local governing body.

Williams, 746 F.2d at 438.[5]

(1941). The *Pullman* abstention doctrine counsels federal courts to defer deciding matters "when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Authority v. Midkiff,* 104 S. Ct. 2321, 2327 (1984). However, "[w]here there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Wisconsin v. Constantineau,* 400 U.S. 433, 439 (1971). In this case, there is no uncertain question of state law. The fact that Praprotnik's claim for reinstatement is still pending before the civil service commission is of no concern here. Praprotnik is not required to exhaust his administrative remedies before pursuing his civil rights claim. *Patsy v. Florida Board of Regents,* 457 U.S. 496, 516 (1982); *see also Simpson v. Weeks,* 570 F.2d 240, 241 (8th Cir. 1978).

[5] This approach is viewed with approval in *Pembaur v. City of Cincinnati,* 106 S. Ct. 1291 (1986).

Applying the first prong of this test, we must consider whether and which city officials were delegated authority to act on behalf of the city in effecting Praprotnik's transfer and lay off. Under the city charter and civil service rules, an "appointing authority"[6] may initiate a lateral transfer or a lay off subject only to the approval of the director of personnel. Under the city civil service rules:

> Transfer of a classified employee from a position under the jurisdiction of one appointing authority to a position under the jurisdiction of another appointing authority may be made with the approval of the Director and the appointing authorities' consent, provided the positions are in the same class or a similar class requiring no additional or different tests of fitness and having the same maximum rate of pay.

Lay offs are also initiated by the relevant "appointing authority." The rules state:

> Whenever there shall be no further need for employment in any position because of either a stoppage of work or lack of available funds or for any other reason, such position may be abolished and regular employees in the classified service may be laid off without pay, despite any provision of the rules concerning tenure.

Again, a supervisory "appointing authority" initiates the action by giving notice to the personnel director and the employee. Thomas Duffe, the city's personnel director, testified that his approval of these actions is conditioned on formal compliance with the rules only; he does not assess their substantive propriety. In this case, there is no dispute that each of the challenged

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[6] An "appointing authority" is defined in the rules as "any person or group of persons having power by law or ordinance, or by lawfully delegated authority, to make appointments to any position in the City Service."

employment decisions were procedurally "by the book"; therefore, under the first prong of the test recited in *Williams,* a jury could reasonably find that Praprotnik's supervisors, his "appointing authorities," were acting on behalf of the city in taking these actions.

The City disagrees, arguing that the City review procedures available to an employee aggrieved by a personnel decision shifts the mantle of City responsibility from the shoulders of Praprotnik's supervisors to the civil service commission, the body charged with hearing appeals from adverse decisions. As the second prong of our test holds, for a city employee to be a "policymaker" his or her decision must "end[] the matter," *Williams,* 746 F.2d at 438, and there must be "no internal procedure of redress for the victim," *id.* The City argues that where as here, Praprotnik could pursue an appeal of his supervisors' decisions, they cannot be deemed final authorities acting on behalf of the City with respect to those decisions.

The existence of an appeal process does not automatically divest a decisionmaker of final authority for purposes of attributing municipal liability, however. In *Bowen v. Watkins,* 669 F.2d 979 (5th Cir. 1982), the question presented was whether a city police chief exercised final authority over promotion decisions even though his decisions were reviewable by the city council. The court stated:

> When an official has final authority in a matter involving the selection of goals or of means of achieving goals, his choices represent governmental policy. If a higher official has the power to overrule a decision but as a practical matter never does so, the decision-maker may represent the effective final authority on the question. Finally, *even if there is an appeal of an action but the appellate body defers in substantial part to the judgment of the original decision-maker,* the original decision may be viewed as the government's policy.

Bowen, 669 F.2d at 989-90 (Wisdom, J.) (citations omitted) (emphasis added); *see also Wilson v. Taylor,* 733 F.2d 1539, 1546-47 (11th Cir. 1984); *Berdin v. Duggan,* 701 F.2d 909, 914 (11th Cir.), *cert. denied,* 464 U.S. 893 (1983). Like Praprotnik, the employee in *Wilson* had recourse to a civil service board, as well as to a city commission, yet the court held that the jury could nevertheless reasonably have found that a police chief had exercised final authority over a decision to terminate. *Wilson,* 733 F.2d at 1546-47.

There is little doubt that the decision to transfer Praprotnik was controlled by his supervisors and not by the civil service commission on appeal. Although the civil services rules do provide an avenue of appeal for non-disciplinary matters such as transfers, the commission refused to hear Praprotnik's appeal on the ground that he had lost nothing by the transfer. This disposition suggests that lateral transfers are insulated from attack on appeal because they are deemed not adverse to the employee.

The scope of redress available for the lay off presents a similar picture. The employee may appeal a lay off to the civil service commission, but according to the personnel director the appeal is decided solely on the basis of written submissions. Such a procedure is indicative of a highly circumscribed scope of review, especially because questions of credibility may enter into the determination of whether a lay off was motivated for proper reasons. Since the commission thereby appears to "defer[] in substantial part to the judgment of the original decisionmaker," *Bowen,* 669 F.2d at 989-90, final authority for a lay off may fairly be said to rest with the initiating supervisor. The jury thus had sufficient evidence from which to conclude that the City may be subject to liability for the supervisor's acts.

First Amendment

Praprotnik urges that both the transfer and the lay off were taken in retaliation for Praprotnik's exercise of his right to appeal his suspension. He argues that he was thereby penalized for exercise of protected activity under the first amendment. This court has distilled a three step analytical framework to be applied in considering such a claim:

> (1) whether the plaintiff has carried the burden of demonstrating that he [or she] engaged in protected activity; (2) whether the protected activity was a substantial or motivating factor in the actions taken against the plaintiff; and (3) whether the defendant has defeated the plaintiff's claim by demonstrating that the same action would have been taken in the absence of the protection activity.

Bowman v. Pulaski County Special School Dist., 723 F.2d 640, 643-44 (8th Cir. 1983) (citations omitted); *see also Barnes v. Bosley*, 745 F.2d 501, 507 (8th Cir. 1984). In this case, only the second and third levels of analysis are in issue. The first question, whether Praprotnik's pursuit of his initial appeal constituted protected activity, has never been challenged by the City.

We must first address, then, whether Praprotnik made the showing that his transfer and lay off were substantially motivated by retaliation for his appeal. This determination is a question of fact for the jury, *see Greminger v. Seaborne*, 584 F.2d 275, 278 (8th Cir. 1978), and this court must thus defer to the jury's finding in the affirmative on this question unless the finding is without substantial evidence to support it. As evidence of the City's motive, Praprotnik relies primarily on the specific sequence of events leading to his transfer and lay off. He points to the consistent decline in his duties and responsibilities from the time he appealed his suspension until he was laid off three years later. In light of Praprotnik's overall employment history, his suspension appeal does represent a watershed point. Until that time, Praprotnik was rated an excellent employee and was consistently promoted and upgraded within his job classification. The relevance of evidence by

superior performance prior to the exercise of protected activity to the question of motive has often been assumed. *See, e.g., McGee v. South Pemiscot School Dist. R-V*, 712 F.2d 339, 344 (8th Cir. 1983); *Greminger*, 584 F.2d at 278 n.3. Moreover, this court has recognized the potential depth of a supervisor's reaction to employee complaints:

> We do not underestimate the internal unease or unpleasantness that may follow when a government employee decides to break rank and complain either publicly or to supervisors about a situation which s/he believes merits review and reform. That is the price the First Amendment exacts in return for an informed citizenry.

Bowman, 723 F.2d at 646 (quoting *Monsanto v. Quinn*, 674 F.2d 990, 1001 (3d Cir. 1982)).

In addition, Praprotnik put forth evidence that his exercise of his appeal right continued to influence his supervisors at CDA at least until October of 1981. At that time, one of his performance raters, Al Karetski, relied on Donald Spaid's adverse comments about Praprotnik, comments apparently motivated by Praprotnik's appeal, to justify an "inadequate" rating in the "relationships" category.[7] Six months later, Praprotnik's transfer was orchestrated by Frank Hamsher, Karetski's boss. Although there is nothing in the record directly suggesting that Hamsher ever saw Karetski's memorandum, Praprotnik did appeal the rating based on the memorandum and it would be reasonable to infer that Hamsher would have reviewed the documents supporting the rating in considering Praprotnik's appeal. Under this view of the facts, a rational jury could reasonably conclude that Praprotnik's transfer was substantially motivated by his exercise of his appeal rights.

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[7] Spaid was the director of the CDA at the time Praprotnik took his initial appeal; Spaid had told other supervisors that Praprotnik should be fired and that Praprotnik was sabotaging the department and could not be trusted.

A closer question concerns the causal relationship between the improperly motivated transfer and Praprotnik's lay off. General principles of causation in tort law are applicable to constitutional torts litigated under § 1983. See *Parrett v. City of Connersville, Ind.*, 737 f.2d 690, 695 (7th Cir. 1984); *cf. Martinez v. California*, 444 U.S. 277, 281, 285 (1980) In *Parrett*, city officials were found to have caused a city employee's constructive discharge following the employee's transfer from a responsible position as a police department detective to a "make work" job. The *Parrett* court eloquently describes the connection between an employee being transferred into such a job and the employee's ultimate decision to leave the job entirely:

> [A]s a former chief of detectives, still young, Parrett was not a drudge or a time-server but an ambitious professional. Enforced idleness was not only a humiliating counterpoint to his years as detective chief but would if prolonged have depreciated his professional skills to the point where it would have been difficult for him to work his way back * * * to a responsible position. For anyone with some self-respect the position that [the defendant] placed Parrett in was intolerable; even if his health had not collapsed under the strain, he would have had to quit. The responsibility for his leaving was thus the defendants'.

Parrett, 737 F.2d at 694. Praprotnik's situation after his transfer was no different; like the employee in *Parrett*, it was only a matter of time until Praprotnik would have been forced to leave his position. That Praprotnik was laid off instead does not shift responsibility away from the actions of his CDA supervisors[8] for causing his severence from City employment.

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[8] The damages Praprotnik seeks did not accrue at the time of his transfer, however, but only upon Thomas Nash and Robert Killen's

We next consider the third step of the *Bowman* analysis: whether the City met its burden of showing that the same actions would have been taken in the absence of the protected activity. Since there were two CDA employees with less seniority than Praprotnik who would have also been candidates for the transfer, and the City produced no evidence justifying Praprotnik's selection over the less senior employees, the jury could have reasonably found that the City failed to meet its burden. Thus, there appears to be sufficient evidence in the record to support the jury's verdict on the first amendment claim with respect to Praprotnik's transfer and lay off.[9]

Due process claim

In final argument to the jury, Praprotnik's counsel set forth his due process theory in the following terms:

> The due process issue evolves [sic] around the question: can a person be laid off for any reason or do they have to be laid off for reasons mandated by the charter and the ordinances of the City of St. Louis.
>
> The judge is going to instruct you that the St. Louis civil service employee can only be laid off for lack of work or

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decision to lay him off. Nash and Killen were thus necessary but not sufficient actors in the ultimate injury. We make this point to again distinguish this case from *Heller*. *See supra* note 3.

[9] The City argues that a transfer can never form the basis of a constitutional deprivation since a City employee has no property interests in a particular assignment. This mischaracterizes the constitutional interests at stake here. Even if an employee has no property interests in a specific job, this court has recognized that "a transfer traceable to speech-related activity is properly the subject of first amendment challenge, even though the transfer resulted in no loss of pay, seniority, or other benefit." *Hughes v. Whitmer*, 714 F.2d 1407, 1421 (8th Cir. 1983). This is because "involuntary transfers can be as effective as discharges in chilling the exercise of first amendment rights." *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 645 (8th Cir. 1983).

> lack of funds. If you find he was laid off for some pretextural [sic] reason, for some other reason, and if you look further and say, "This deprived him of his constitutional rights, his right to a job" —
>
> * * *
>
> So if somebody comes and takes your job in violation of the charter, then he is entitled to what we call due process consideration.

We perceive Praprotnik's theory to be that a lay off for any other reason than those stated in the city charter *ipso facto* violates due process. The trial court's instruction, as requested by the plaintiff, appears to adopt the same theory. We cannot agree with this characterization of the reach of the due process clause. Although the due process clause substantively prohibits certain arbitrary, capricious, or irrational acts on the part of government, *Daniels v. Williams,* 106 S. Ct. 662, 677-78 (1986) (Stevens, J., concurring), the mere fact that the government does not abide by the strict terms of its own rules does not necessarily imply that it has acted irrationally or for constitutionally improper reasons. *See State of Mo. ex rel. Gore v. Wochner,* 620 F.2d 183, 185 (8th Cir. 1980). Thus, insofar as Praprotnik relied on a substantive basis for his due process challenge, it was error to submit this count to the jury.

For the first time on appeal, Praprotnik also suggests that his lay off was procedurally defective in violation of due process. In his brief he contends that the manner of his lay off failed to afford him adequate pretermination procedures and that the post-termination hearing permitted by the civil service rules was also unconstitutionally limited. In the ordinary, budgetary lay-off situation, however, individual pre-lay-off hearings are not necessary given the impracticality of imposing such a requirement. *See Smith v. Sorensen,* 748 F.2d 427, 435 (8th Cir. 1984).[10] Furthermore, Praprotnik's failure to raise the procedural due process issue in the trial court precludes him from raising the issue on appeal for the first time. *See Singleton v. Wulff,* 428 U.S. 106, 120 (1976); *Cato v. Collins,* 539 F.2d 656, 662 (8th Cir. 1976).

The remaining possible theory of recovery is that Praprotnik was denied due process because he was laid off in retaliation for his exercise of his first amendment rights. Assuming that this is the theory on which the jury did decide in his favor on the due process claim, the verdict could be sustained on the issue of liability. Because, as we next discuss, however, an award of damages on the due process claim would be improper, we nevertheless must vacate the due process verdict.

Damages

Where jury awards under two separate counts represent a duplication of damages, a plaintiff should be limited to recovery under only one count. *See In re IBP Confidential Business Documents Litigation,* 755 F.2d 1300, 1318 (8th Cir. 1985); *Morrill v. Becton, Dickinson and Co.,* 747 F.2d 1217, 1224 (8th Cir. 1984). In this case, the jury rendered an identical $15,000 verdict under each count. The fact that the jury returned identical amounts in damages under each count convinces us that either an improper duplication is reflected in the verdicts or the jury awarded damages for a due process violation where no substantive claim is cognizable. Accordingly, we vacate the judgment with respect to the due process verdict and award, but affirm the $15,000 judgment on the verdict based on the City's violation of Praprotnik's first amendment rights.

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[10] In *Smith,* this court noted that "[t]he establishment of the [lay-off guidelines] involved an interpretation of Merit System rules by state officers faced with funding shortfalls," and reasoned that "[t]o require a hearing on the *possibility* that such an interpretation might be incorrect would considerably burden governmental decisionmaking." *Smith v. Sorensen,* 748 F.2d 427, 435 (8th Cir. 1984) (emphasis in original). Whether this observation is still applicable in light of *Cleveland Board of Education v. Loudermill,* 105 S. Ct. 1487 (1985), we reserve for another day.

Jury instructions

The City further contends that the trial court prejudicially erred by failing to submit three requested instructions to the jury. The City first requested that the jury be instructed that "[a]n isolated incident of illegal conduct on the part of a municipality's agents, servants or employees is not sufficient to establish a governmental * * * policy such as would give rise to [municipal] liability * * * pursuant to 42 U.S.C. §1983." The district court committed no error in not submitting this instruction since it is at best a misleading statement of the law. As *Pembaur* has made clear, an "isolated act" *may* give rise to municipal liability if the action is initiated by a person with authority to make policy on the matter. *Pembaur,* 106 S. Ct. at 1298-99. "Unless a requested instruction is entirely correct and may be given without qualification, there is no error in refusing it." *Brown v. Cedar Rapids and Iowa City Ry. Co.,* 650 F.2d 159, 165 (8th Cir. 1981).

The City also objects to the trial court's failure to instruct the jury that a public employee generally has no property interest in a particular job assignment. Even assuming this is a correct statement of the law, it is irrelevant to any issue raised at trial. As we stated in *Feemster v. Dehntjer,* 661 F.2d 87 (8th Cir. 1981), "This Court has long recognized that 'instructions may not in their language leave the way open to a jury to consider some question * * * which *is not an issue* or is not supported by the evidence." *Id.* at 89 (quoting *Fleming v. Husted,* 164 F.2d 65, 69 (8th Cir. 1947)) (emphasis added in *Feemster*). Praprotnik did not assert any claim premised on a property interest in his job at CDA in particular, nor is the existence of such a property interest relevant to any defense asserted by the City. Since the question raised by the instruction was therefore not in issue, the court did not err in refusing to submit it.

The third instruction requested by the City and refused by the trial court states that "[s]o long as there is substantial compliance with applicable personnel procedures, failure to strictly adhere to such procedures does not amount to a constitutional deprivation." Because we agree that Praprotnik's due process claim should not have been submitted to the jury, we need not pass on the propriety of the trial court's refusal to give the requested instruction.[11]

Attorney fees

The district court awarded Praprotnik's attorney $10,000 in fees upon his motion that he be awarded $19,161 in fees. The court first reduced the requested sum by $936, compensation for work which the court found was not actually performed for the lawsuit. The remainder, $18,225, was deemed reasonably expended based on a reasonable rate. However, the court further reduced this amount to $10,000, apparently relying principally on the absence of "documentation evidencing a fee arrangement which would have allowed [Praprotnik's attorney] to retain more than one-third of plaintiff's award as fees for this services," and also noting the relatively small recovery, the failure to recover punitive damages, and the early dismissal of Praprotnik's claims under 42 U.S.C. §§ 1985, 1986. We discern no abuse of discretion in the district court's order, but remand the issue of attorney fees for reconsideration in light of our vacation of the award on the due process claim.

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[11] We recognize that in *Memphis Community School District v. Stachura,* 106 S. Ct. 2537 (1986), the Supreme Court held that it was error for a trial court to submit an abstract damage instruction on a constitutional claim. The damage instruction given by the trial court is nearly identical to the instruction found erroneous in *Memphis.* Unlike *Memphis,* neither party in the present case objected to the instruction at trial nor was the issue raised on appeal. Moreover, since the actual damages proved by Praprotnik exceeded $30,000, we are convinced the verdict award was not unduly prejudicial.

Conclusion

The judgment on the verdict for $15,000 for the violation of Praprotnik's first amendment rights is affirmed; the judgment of $15,000 for the violation of due process is vacated; the claim for attorney fees is remanded to the district court for reconsideration.

ROSS, Circuit Judge, dissenting.

The majority reverses Praprotnik's due process verdict and affirms his first amendment verdict. I agree with the former decision but not the latter. In my view, the evidence adduced at trial was insufficient to support either a finding of municipal liability or a finding that Praprotnik's first amendment rights had been violated. In addition, at the very least, this case needs to be remanded for a trial on damages because the jury was given an improper instruction on compensatory damages.

1. Municipal Policy

Praprotnik alleges that the City of St. Louis has a policy of retaliating against employees who appeal adverse personnel decisions to the City's Civil Service Commission. He further alleges that the City acted in accordance with this policy when it transferred him in 1982 and laid him off in 1983.

Local governments may be held liable under 42 U.S.C. § 1983 for the execution of policies or customs "made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy." *Monell v. Department of Social Services,* 436 U.S. 658, 694 (1978). As indicated by the majority opinion the more recent Supreme Court discussion on this subject is set forth in *Pembaur v. City of Cincinnati,* 106 S.Ct. 1292 (1986).

In *Pembaur,* the Court held that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Id.* at 1298. The Court then added:

> Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. *Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.* The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. * * * The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Id. at 1299-1300 (footnores omitted, emphasis supplied). This policymaking requirement was illustrated in footnote 12 with an employment example directly applicable to this case:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, *if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner;* the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions would represent county policy and could give rise to municipal liability.

Id. at 1300, n.12 (emphasis deleted and added).

In this case, Praprotnik did not submit any independent evidence that the City has a policy of retaliating against employees for appealing personnel decisions. Instead, he relies solely on evidence relating to his own employment difficulties following his appeal of the suspension.[1] *Compare Williams v. Mensey,* 785 F.2d 631, 635 (8th Cir. 1986) (prisoner's reliance on evidence concerning his own treatment in jail held insufficient to support inference of municipal policy). The majority concludes that this evidence is sufficient because the transfer and layoff decisions were made by "appointing authorities" who, under the City's civil service rules, may transfer and lay off employees under certain conditions subject to the approval of the City's personnel director.

There are two problems with the majority's analysis. First, the civil service rules relied upon, *see ante* at 9, permit appointing authorities some discretion in making certain personnel decisions but do not grant them the power to set city personnel *policy.* That power remains with the mayor and aldermen through the passage of ordinances, and with the Civil Service Commission via its duty "[t]o consider and determine any matter involved in the administration and enforcement of * * * [the provisions of the City's Charter relating to civil service] and the rules and ordinances adopted in accordance therewith that may be referred to it for decision * * * on appeal by any * * * employee * * * of the city, from any act of the director [of personnel] or of any appointing authority." City Charter of St. Louis, Article XVIII, Section 7, paragraph (d). Because appointing authorities lack the authority to establish employment policy for the City, their decisions cannot constitute a basis for City liability. *See Pembaur v. City of Cincinnati, supra,* 106 S.Ct. at 1299-1300 & n. 12.

The second problem with the majority's analysis is that appointing authorities do not have "final authority" to make employment decisions. *Id.* at 1299. As recognized by the panel decision in *Williams v. Butler, supra,* 746 F.2d at 437: "In a situation where the victim of an unconstitutional employment decision and act is afforded redress by a procedure established by a local governing body, which could correct the injustice, that body can avoid liability for the unconstitutional acts of its officials—and the victims can be made whole." Here, the City's Civil Service Commission is available to review the employment decisions of appointing authorities and it is the Commission's decision which is final. *See* City Charter of St. Louis, Article XVIII, Section 7, paragraph (d) ("The decision of the Commission in * * * [civil service] matters shall be final"). The majority's determination that the Commission virtually rubber-stamps the decisions of appointing authorities is belied by the fact that Praprotnik took five appeals to the Commission between 1980 and 1983 and obtained relief from the Commission every time except on his appeal of the transfer decision. Moreover, he lost that appeal only because the transfer had not harmed him at the time of his appeal to the Commission.

2. First Amendment

Even if Praprotnik had submitted sufficient evidence to establish a municipal policy, the City cannot be properly held liable because the evidence does not support a finding that Praprotnik's first amendment rights were violated when he was transferred and laid off from city employment. The facts supporting Praprotnik's first amendment claim consist of the following. First, shortly after Praprotnik's appeal to the Commission in 1980, he began to receive poor performance evaluations and management had a different "attitude" towards him. Then, in 1982, he was transferred to a different city agency in a position of equal pay and equal grade.[2] Some of Praprotnik's architectural duties were transferred to the new position but his superior at the new agency took those duties for himself. Thus, Praprotnik did not get to perform the type of work that he wanted to. Finally, in 1983, Praprotnik was laid off.

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[1] The majority fails to fully describe the suspension dispute, leading readers to infer that the fifteen-day suspension was wholly unjustified or that it involved a noble cause. In fact, the suspension was precipitated by Praprotnik's failure to obtain permission to perform architectural work for his own private clients. Praprotnik appealed this suspension to the St. Louis Civil Service Commission. The Commission set aside the suspension but reprimanded Praprotnik for not obtaining a clear understanding of the agency's secondary employment disclosure rules.

These facts are entirely insufficient to support Praprotnik's claim that he was transferred and laid off in retaliation for appealing the suspension decision. Evidently realizing that the evidence does not even begin to support a finding that the 1983 layoff decision was motivated by the 1980 suspension appeal, the majority relies solely on the transfer decision. The majority determines that the transfer decision was motivated by the suspension appeal because: 1) Praprotnik began to receive poor evaluations after the suspension, and 2) employee complaints to superiors about a particular situation (such as the secondary employment disclosure rules at issue in the 1980 suspension dispute, *see ante* at 22, n.1) often cause adverse reactions by supervisors. The poor evaluations received by Praprotnik, however, did not cause the transfer, and step decreases and low ratings stemming from the evaluations were modified by the Civil Service Commission. Further, the decision to transfer Praprotnik was made by Frank Hamsher, a person who had not even been involved in either the suspension dispute or Praprotnik's appeal of that suspension. Hence, the evidence is just too weak and attenuated to support a finding that the transfer or

layoff decisions were motivated by Praprotnik's appeal of the suspension decision.

The evidence also does not support a conclusion that the transfer caused the layoff. The majority infers that "it was only a matter of time until Praprotnik would have been forced to leave his position" at the new agency because he was only permitted to perform clerical functions. *Ante* at 14. Yet, Praprotnik "lasted" over a year and a half at the new agency and has given us every reason to believe that he wanted to continue his employment with the City at the time he was laid off. Praprotnik was apparently assigned only clerical duties at the new agency, but that was not a necessary result of the transfer. The problem with duty assignments arose only because Praprotnik's supervisor at the new agency, Henry Jackson, wanted to perform Praprotnik's architectural duties. This fact brings us back to the motivation issue. If Praprotnik is seeking to recover on the basis that he was constructively discharged by the duty assignment problem, he would have to show that Jackson was motivated by Praprotnik's suspension appeal when Jackson made the duty assignments. Praprotnik has not even attempted to make such a showing.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

---

[2] Praprotnik's transfer occurred at a time when "major staff and budget reductions were made in Praprotnik's [former] agency." *Ante* at 3. In short, Praprotnik was not the only person who was transferred to a different agency in the spring of 1982.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-1145/1267/1268EM

James H. Praprotnik,
Appellee,
v.
City of St. Louis, etc.,
Appellant.
Frank Hamsher; Charles Kindleberger,
Community Development Agency; and
Deborah Patterson, Community Development
Agency.

Appeal from the United States District Court
for the Eastern District of Missouri.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court awarding Praprotnik Fifteen thousand Dollars ($15,000) for violation of his first amendment rights is affirmed. It is further ordered that the portion of the judgment awarding Praprotnik damages for a due process violation is reversed and vacated. Praprotnik's claim for attorneys' fees is hereby remanded for further consideration in light of the Court's vacation of the award on the due process claim.

August 19, 1986

Appellee/cross-appellant shall recover the sum of $3,552.50 for attorneys fees and costs from appellant/cross-appellee.

A true copy:

ATTEST,

Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
8th Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 83-287C (3)

James H. Praprotnik,
Plaintiff,

v.

City of St. Louis, Frank Hamsher,
Charles Kindelberger, and Deborah
Patterson,
Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable William L. Hungate, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict;

IT IS ORDERED AND ADJUDGED that, in accordance with the jury's verdict, the plaintiff recover of the defendant City of St. Louis on plaintiff's claim arising out of the issues of right to free speech and to petition for redress of grievances and for loss of his job by reason of his layoff for the pretextual reason of lack of funds the sum of THIRTY THOUSAND DOLLARS ($30,000.00), with interest thereon at the rate of 10.33% per annum and costs.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff take nothing by his cause of action against defendants Frank Hamsher, Charles Kindelberger, and Deborah Patterson, that the action be dismissed on the merits, and that the defendants recover of the plaintiff their costs of action.

Eyvon Mendenhall, Clerk

By: Florence H. Bertel,
Deputy Clerk

Dated at St. Louis, Missouri,
this 19th day of November, 1984.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-1145/1267 & 1268-EM

James H. Praprotnik,
Appellee/Cross-Appellant,

v.

City of St. Louis, etc.,
Appellant/Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri.

Appellant/cross-appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

September 19, 1986

OPPOSITION
BRIEF

Supreme Court, U.S.
FILED
DEC 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 86-772

In The

Supreme Court of the United States

October Term, 1986

City Of St. Louis,
Petitioner,

vs.

James H. Praprotnik,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A Verdict against the City is not inconsistent with a verdict in favor of three individual defendants where the jury could have found that the actions of municipal officials other than the individual defendants represented a government decision and caused the plaintiff's injuries.

2. The City agreed to the jury instruction delineating the standards for imposition of liability upon a municipality for the acts of its employees and is estopped from now asserting different criteria.

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No. 86-772

In The

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On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY AND PROCEDURAL PROVISIONS

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Fed.R.Civ.P. 51. Instructions to Jury: Objection

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

James H. Praprotnik filed a complaint in the U. S. District Court in February 1983 based on 42 U.S.C. §1983 and named the City of St. Louis (City) and various high City officials as defendants.[1]

Mr. Praprotnik originally filed his suit after his transfer when the Civil Service Commission refused to hear his appeal. He alleged that he was rated down, deprived of profesaional responsibilities and transferred because of his exercise of his right of appeal to the Civil Service Commission and his testimony under oath before the Heritage and Urban Design Commission, in violation of his rights under the First, Fifth and Fourteenth Amendments of the U. S. Constitution (Jt. App. 15).

The nexus of the complaint was a transfer in 1982 of Mr. Praprotnik from the Community Development Agency (CDA) to the Heritage and Urban Design Commission (HUDC).

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[1] Unless otherwise noted, the facts stated herein are cited in the opinion of the Court of Appeals.

The chain of events leading to that transfer began with an appeal by Mr. Praprotnik to the Civil Service Commission (Commission) of a fifteen day suspension imposed in April 1980 by Mr. Charles Kindleberger, Praprotnik's immediate supervisor. A few weeks prior to the suspension, Kindleberger had rated Mr. Praprotnik and recommended him for a two grade increase, based on Praprotnik's superior performance. The Commission set aside the suspension in an October 1980, decision. Later in October 1980, Praprotnik was rated again, his performance was "good" overall and he was recommended for a two-step decrease in salary grade.[2]

In October 1981, Mr. Praprotnik's performance was reviewed again and he received an "adequate" in several categories and an "inadequate" in "relationships".[3] Prior to Mr. Praprotnik's suspension appeal, he had never received a rating lower than "good" in his twelve years of City employment.

Praprotnik's appointing authority (Donald Spaid) did not agree with the Commission action of setting aside the suspension, he felt that Praprotnik had not been honest and became "down on him." (Tr. I, 54, 55)

Praprotnik was later called to appear and testify before the Heritage & Urban Design Commission (Tr. II, 4).

In response to questions from HUDC, Praprotnik testified that the Serra Sculpture had been offered to the City on prior occasions and that the City had rejected it. There was, however, a great deal of interest in the work from the Mayor's Office (Tr. II, 90). Frank Hamsher was displeased about Praprotnik's testimony before the HUDC (Tr. III, 180). The Post Dispatch Pulitzer family wanted the Serra Sculpture installed (Tr. III, 251) and the Mayor had made the decision to support the Sculpture (Tr. III, 180).

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[2] Mr. Praprotnik appealed this rating and was awarded a one step increase.

[3] Praprotnik also appealed this rating, which appeal resulted in the "inadequate" being raised to "adequate".

At HUDC, there was a vacant position of less responsibility and less salary than Mr. Praprotnik's at CDA. Frank Hamsher, then the Director of CDA, proposed that some of Mr. Praprotnik's duties be transferred and consolidated with the HUDC position, creating a position of an equivalent grade to Praprotnik's CDA position. The Director of HUDC, Henry Jackson, and Thomas Nash, Director of Public Safety, acceded to the proposal. In March of 1982, Praprotnik was called to Frank Hamsher's office and told that he was being transferred to HUDC (Tr. I, 67). Mr. Hamsher told Praprotnik that this was to be a lateral transfer of personnel and job functions (Tr. II, 68), that Praprotnik was transferred to consolidate design functions (Tr. III, 171-172). Mr. Duffe, Director of Personnel, was told by Mr. Hamsher that there would be a transfer of functions (Tr. III, 120, 126, 127). Arnold Montgomery, Director of HUDC at time of trial, testified that there was no documentation showing the transfer of functions and that he did not know of any transfer of functions (Tr. I, 154, 155). Mr. Kindleberger testified that there was no documentation of the transfer of functions (Tr. III, 246). Only the Mayor or the Board of Estimate and Apportionment could transfer functions from one appointing authority to another (Tr. II, 180) and the Mayor had the final decision (Tr. II, 185). The transfer of Praprotnik's position required a budget change which could only be made by the Board of Estimate and Apportionment consisting of the Mayor, President of the Board of Aldermen, and the Comptroller (Tr. I, 75). Witnesses testified that the Mayor of the City made the decision to transfer Mr. Praprotnik (Tr. 3-200). The Civil Service Commission refused to hear an appeal of the transfer.

By that transfer, Mr. Praprotnik moved from a position of seniority in his CDA job classification to being the only employee in his HUDC classification. Henry Jackson, the Director of HUDC, assumed what there was of Mr. Praprotnik's architectural duties which had purportedly transferred with him.

Praprotnik was given menial and clerical responsibilities which were far below his management position, i.e., mounting photographs, roll filing maps, recording complaints (Tr. I, 77).

In November 1982, Jackson recommended that Praprotnik's position be reclassified and that his salary be decreased by one step. Jackson also rated his performance as "inadequate" overall.

Praprotnik's appeal of this rating resulted in the "inadequate" being raised to "adequate" and the pay reduction recommendation being reversed.

However, his position was reclassified to a lower grade.

In November 1982, after Praprotnik had been with the agency for approximately 6 months, Jackson also attempted to lay him off (Tr. I, 78, 79). On November 4th, 1982, Mr. Jackson, requested a lay off list from Mr. Duffe for the position of City Planning Manager (Pl. Ex. 133). On the same date, Mr. Duffe sent Mr. Jackson a layoff list naming James Praprotnik (Pl. Ex. 134), Mr. Praprotnik was the only City Planning manager at HUDC. A letter dated November 5, 1982 was drafted advising Praprotnik that he was being laid off effective November 67, 1982 (Pl. Ex. 135). This letter was never sent and Praprotnik was not aware of the fact that there had been a proposed layoff until after the lawsuit had been filed and he obtained this information through discovery (Tr. I, 78, 79).

Robert Killen, Jackson's replacement as Director of HUDC, testified that in July 1983, plans were again being formulated to lay Mr. Praprotnik off.

Mr. Praprotnik was laid off the day before Christmas Eve, 1983, and the day after he was released from the hospital following surgery. His layoff eliminated his income, voided his 500 plus hours of accumulated sick leave and his pension and vacation benefits, and cancelled his medical insurance.

He sought and was granted leave of court to amend his complaint to include his layoff.

REASONS FOR DENYING THE WRIT

1. A Verdict against the City is not inconsistent with a verdict in favor of three individual defendants where the jury could have found that the actions of municipal officials other than the individual defendants represented a government decision and caused the plaintiff's injuries.

The City seeks to have this Court hear and determine the unique set of facts comprising *Praprotnik v. City of St. Louis* with the argument that the Court of Appeals wrongfully avoided *City of Los Angeles v. Heller,* 475 U.S. ____, 89 L.Ed.2d 806 (1986) and set itself on a collision course with other circuits.[4]

Heller, supra, an opinion issued on the basis of the petition for writ of certiorari and brief in opposition thereto, does not negate the Eighth Circuit's *Praprotnik* decision; *Pembaur v. City of Cincinnati,* 475 U.S. ____, 89 L.Ed.2d 452 (1986) affirms it. *Heller* differs from *Praprotnik* in two essential ways. In *Heller,* the jury was not instructed on any affirmative defense, including good faith, on behalf of the defendants; the *Praprotnik* jury was instructed regarding affirmative defenses. Nevertheless, the *Heller* jury returned a verdict in favor of the individual defendants who represented all of the persons alleged to have committed the constitutional violation; the *Praprotnik* jury, on the contrary, was not presented with a decision on each of the individuals alleged to have participated in the systematic deprivation of Mr. Praprotnik's constitutional rights.

In *Pembaur,* the person who initiated the events which Pembaur complained of was the Hamilton County Prosecutor, the man who directed his assistant to instruct the Deputy Sheriffs to

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[4] The City cites *Hannah v. City of Overland, MO.,* 795 F.2d 1385 (1986) as a case wherein the Eighth Circuit was inconsistent with itself. However, *Hannah* was a case in which all of the individual actors in the complained of violation were defendants and in favor of whom the jury returned its verdicts.

"go in and get [the witnesses]" whereupon the Cincinnati police chopped down Pembaur's inneroffice door with an axe, was not a party to Pembaur's suit. The City of Cincinnati, the County of Hamilton, Assistant Prosecutor Whalen and various others were defendants. The District Court, after trial, dismissed the complaint. Pembaur appealed the dismissal as to the City, County, and Whalen; the Court of Appeals upheld the dismissal of the County and of Whalen and reversed as to the City. Pembaur then petitioned for certiorari only as to the dismissal of the County.

This Court reversed.

In its reversal, the Court took *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978) to its next logical step.

Monell overruled *Monroe v. Pape,* 365 U.S. 167 (1961) in determining that, while a municipality could not be held liable on a respondeat superior theory, it could be held liable where the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adapted and promulgated by that body's officers. 436 U.S. at 690.

The *Pembaur* opinion refined *Monell's* definition of §1983 municipal liability. "However, as in Owen and Newport, a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. *To deny compensation to the victim would therefore be contrary to the fundamental purpose of §1983.*" 89 L.Ed.2d at 463, 464.

The jury's verdict in favor of three individuals was not dispositive of the case. As in *Pembaur,* there were nonparty participants; the City remained a defendant against whom the jury properly could and did impose liability for its decisionmakers' unconstitutional actions.

2. The City agreed to the jury instruction delineating the standards for imposition of liability upon a municipality for the acts of its employees and is estopped from now asserting different criteria.

The jury was instructed as follows:

"As a general principle, a municipality is not liable under 42 U.S.C. §1983 if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision." (Instruction 15; A. 150; Tr.IV, 4).

The City made no objection, rather it agreed to the jury being instructed thus.

Plaintiff introduced evidence of participation by various high City officials in the fatal actsnof transferring him to an exposed position only to later lay him off from that position: the Mayor, two CDA Directors, two HUDC Directors, two CDA high administrators, and the Director of Public Safety. Not all of these individuals were named as defendants.[5]

Thus, of the officials whose actions were examined by the jury, the jury was presented with a specific question regarding only three.[6], [7]

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[5] Plaintiff filed a Motion to Add Additional Parties, the Mayor, two of his administrative aides, and the Director of Public Safety; the Motion was denied. (J.A. 233).

[6] The City continually, hopefully refers to plaintiff's transfer as being "Hamsher's decision." Hamsher was one of the three defendants in favor of whom the jury returned a verdict. However, the evidence was, as the Court of Appeals agreed, that the transfer was the decision not only of Hamsher, but also of the Mayor, Jackson, and Nash.

[7] Plaintiff's counsel, without objection, closed with an argument that: "Now, she [defendants' counsel] says maybe there are other high officials we should have brought in, that's why we sued the City of St. Louis. If other high officials did this to him, then the City is responsible." (Tr. IV, 56). After closing arguments, the Court read its instructions to the jury. (Tr. IV, 64).

The City now urges, by implication, that an instruction should have been read that liability is imposed on a city on the basis of a decision made by a city employee: 1) who was delegated the power to establish final governmental policy in the area; 2) who acted pursuant to a rule of general applicability established by official action; and 3) who acted pursuant to a formal process.

Rule 51 of the Federal Rules of Civil Procedure mandates, in part, that "...No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The City, by implication, is disobeying Rule 51 by presenting Question Two.

Failure to object in a timely manner to instructions and to thereby insure that the trial judge has an opportunity to make the corrections forecloses the raising of those contents as an issue on appeal. Rule 51, Fed. R. of Civ. Proc., *Kropp v. Ziebarth*, 601 F.2d 1348 (8th Cir. 1979), *Johnston v. Pierce Packing Co.*, 550 F.2d 474 (9th Cir. 1977), Wright & Miller, Federal Practice and Procedure: Civil §2558 (1971).[8]

The trial court instructed the jury as to the rule against which to measure municipal liability and the City cannot now propound a different standard.

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[8] For the reasons outlined in Question 1, *supra*, the concerns of *Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981) are not applicable in this case.

CONCLUSION

For the reasons set forth above, the Petition For A Writ Of Certiorari should be denied, and this Court should refuse to issue an order reversing and remanding the judgment of the Appeals Court.

Respectfully submitted,

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JOINT
APPENDIX

Supreme Court, U.S.
FILED
FEB 26 1987
JOSEPH F. SPANIOL, JR.
~~CLERK~~

No. 86-772 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF ST. LOUIS,
Petitioner,

VS.

JAMES H. PRAPROTNIK
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 13, 1986
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135 pp

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

DOCKET ENTRIES

Date	N.R.	Proceedings
2/8/83	(1)	COMPLAINT (1 count) fld. 5 summonses issued (20 days). JURY.
2/22/83		SUMMONS RETURNS executed on Charles Kindelberger by serving Joan Spitale, 2/17/83; Deborah Patterson by serving Deborah Gibbs 2/17/83 fld.
2/16/83		SUMMONS RETURNS executed on Henry Jackson by serving Robert Kellen 2/15/83; Frank Hamsher by serving Mary Dusold, recp, 2/15/83; Vincent Schoemel by serving Mary Dusoid, recpt, 2/15/83 fld.
3/16/83	(2)	ANSWER fld. by defts City of St. Louis, Hamsher, Kindelberger and Patterson. Leave to file granted. WLH.
3/16/83		ENTRY OF APPEARANCE behalf of Henry Jackson for limited purpose of denying validity of service and for filing motion to set aside purported service of process fld. by counsel Judith A. Ronzio. So Ordered. WLH.
3/16/83	(3)	Special Entry of Appearance by deft. Jackson for limited purposes of denying validity of service of process and moving to set aside purported service of process; AFFIDAVIT of Robert Killen fld. by deft. Jackson. (Ref. [8/22/83)
		4/5/83 — Special entry of appearance by deft., Jackson for limited purposes of denying validity

	of service of process etc., which was fld by deft Jackson 3/16/83 & entire file submitted to Judge Hungate
6/8/83 (4)	ORDER (WLH) fld. Deft. Jackson's motion set aside service of process granted; pltff granted 45 days from date of order effect proper service on deft. Jackson or suffer dismissal without prejudice as to deft. Jackson. cc: attys.
8/10/83	DEPOSITION of Frank Hamsher, fld. on behalf of pltff.
	8/12/83 Pltff. having not complies with Court's order entered 6/8/83 entire file submitted to Judge Hungate.
8/22/83 (5)	ORDER (WLH) fld. Pltff's complaint against deft. Henry Jackson in above-entitled cause dismissed without prejudice failure obtain timely service of process in accordance with court order 6/8/83. cc: attys.
9/1/83	ORDER (WLH) fld. Parties jointly/individually file status report by 10/3/83. cc: attys.
9/1/8	ORDER OF COURT relating to trial (jury 12/12/83 9:30AM) (WLH) fld. cc: attys. (Discovery completed by 11/14/83)
10/6/83	LETTER-REQUEST, 10/6/83, for extension thru 10/14/83 file status report fld. by deft. So Ordered. WLH. cc: attys.
10/17/83	LETTER, 10/14/83, to Judge Hungate re status fld. by parties. Submitted Judge Hungate.
10/19/83 (6)	REQUEST to produce documents to defts fld. by pltff.

12/2/83	EXTENSION until 12/5/83 file pretrial material fld. by deft. Without objection, so ordered, WLH.
12/2/83	DEPOSITION — Robert A. Killen, Jr., 10/31/83 fld. by pltff.
12/5/83	PRETRIAL MATERIAL fld. by pltff (agreed statement of facts, witness list, exhibit list, depo lines, proposed instructions trial memorandum).
12/5/83 (7)	MOTION for summary judgment of alternatively for judgment on the pleadings; MEMORANDUM in support w/exhibits A,B,C; AFFIDAVIT of William C. Duffe fld. by defts. Ref. ____
12/5/83	PRETRIAL MATERIAL fld. by defts. (stipulation of facts, witness list, exhibit list, adoption of memo in support of defts' motion for summary judgment as memorandum of law, proposed jury instructions).
12/12/83	ORDER (WLH) fld. Cause *reset jury docket commencing 3/12/84,* 9:30AM cc: attys.
12/13/83	REQUEST for continuance to be reset by court; pltff granted thru 12/23/83 respond defts motion for summary judgment fld. by pltff. Leave granted, WLH. cc: attys.
12/12/83	CAUSE CALLED; counsel for pltff advised court his client is ill and not ready this day; defts announce ready; parties to check with court at 4PM this day as to when case might be set for trial.
12/23/83	EXTENSION OF TIME — Pltff. granted up to and including Jan. 6, 1984 within which to reply to deft.'s Motion for Summary Jumt. WITH-

		OUT OBJECTION, LEAVE GRANTED, (WLH), memo fld.
1/6/84	(8)	RESPONSE to defts motion for summary judgment w/attachments fld. by pltff.
1/9/84		AFFIDAVIT of James Praprotnik (for attachment to response to defts motion for summary judgment) fld.
1/24/84		ORDER (WLH) fld. Defts letter-request for continuance granted and cause reset jury trial *docket commencing 4/9/84,* 9:30AM. cc: attys.
2/13/84		DEPOSITION — Harold Brewster, 12/9/83 fld. by pltff.
3/19/84	(9)	SUPPLEMENTAL INTERROGATORES (4 — Total 4) to deft. City of St. Louis fld. by pltff. Leave granted, WLH.
3/19/84	(10)	*AMENDED COMPLAINT* (1 count) fld. Leave to file granted, WLH.
3/19/84		ORDER (WLH) fld. Cause reset *jury docket commencing 6/11/84,* 9:30AM. cc: attys.
6/4/84	(11)	ANSWERS to pltff's supplemental interrogatories fld. by deft. City of St. Louis.
6/4/84		SUPPLEMENT to Pre-Trial compliance, fld., by pltff. with attachments.
6/5/84	(12)	FIRST AMENDED ANSWER, fld. by defts. (Leave to file requested on a Memo — SO ORDERED, WLH)
6/5/84		SUPPLEMENT to Pre-Trial Compliance, fld. by defts. (Leave to file request on a Memo — SO ORDERED, WLH)

6/6/84	(13)	ANSWER to Amended Complaint, fld. by defts. (SO ORDERED, WLH)
6/6/84		MEMORANDUM — defts move that the Court consider defts' motion for summary judgment, filed heretofore in response to pltff's complaint, as being in response to pltff's amended complaint, and applicable thereto, fld.
/8/84	(14)	ORDER & MEMORANDUM — HEREBY ORDERED that defts' motion for summary judgment, or alternatively for judgment on the pleadings, be and the same is granted as to deft. City of St. Louis and as to all pltff's claims under 42 U.S.C. §§ 1985 and 1986, and denied as to the remainder. (WLH) (cc: attys.)
/12/84		MEMORANDUM — Cause called & parties announce ready for trial — parties advised to check back with the Court after 4:00 p.m. this day.
/14/84		ORDER (WLH) Ordered that this cause be and is removed from the 6/11/84 docket and reset for a jury trial on the docket commencing *Tuesday, October 9, 1984, at 9:30 a.m.* cc: attys
8/9/84	(15)	MOTION to add additional defts., fld. by pltff. (ref: 8/17/84)
8/17/84		SEE ENDORSEMENT ON Pleading #15. (DENIED, WLH) cc:attys
8/17/84	(16)	SUGGESTIONS in opposition to pltff's motion to add additional defts., fld. by deft.
8/18/84		DEPOSITION of James H. Praprotnik on 7/7/83, fld. by defts.
8/27/84	(17)	MOTION to amend interlocutory order of 8/17/84 and MOTION to amend interlocutory

order of 6/8/84 with Memorandum in support of both motions fld. by pltff. (REF: 9-6-84)

8/27/84 NOTICE OF Deposition of Thomas R. Nash, William Lynn Edwards, John J. Temporiti, William C. Duffe and Honorable Vincent Schoemehl on 9/6/84, fld. by pltff.

9/6/84 (18) ORDER (WLH) ORDERED that pltff's motion to amend interlocutory order of 8/17/84 be and is DENIED. FURTHER ORDERED that pltff's motion to amend interlocutory order of 6/8/84 be and is DENIED. cc: attys.

9/14/84 (19) MOTION for reconsideration of the Court's order of 6/8/84 granting motion for summary judgment on behalf of the City of St. Louis, Affidavit of James Praprotnik, Affidavit of Charles R. Oldham with Memorandum in support, fld. by pltff. (REF: 10/5/84)

9/20/84 (20) MOTION to compel answers to questions propounded in depositions of Vincent Schoemehl, John Temporiti and Thomas R. Nash, fld. by pltff. (Memorandum states that motion set for hearing on Friday, September 21st, 1984, by consent.) (Ref: 9/27/84)

9/20/84 QUESTIONS for certification — Depositions of Vincent Schoemehl, John J. Temporiti and Thomas R. Nash on 9/13/84, fld.

9/25/84 Motion for reconsideration of the Court's order of 6/8/84 granting motion for summary judgment on behalf of the City of St. Louis, etc., which was fld. by pltff 9/14/84 & entire file submitted to Judge Hungate.

9/27/84 SEE ENDORSEMENT on Pleading #20. Motion to Compel answers to questions propounded in depositions of Vincent Schoemehl, John Temporiti and Thomas R. Nash. (DENIED, WLH) cc: attys

9/27/84 MOTIONS for full and partial summary judgment, or in the alternative for judgment on the pleadings with Memorandum of Law in support, fld. by defts. Hamsher, Kindleberger and Patterson. (ref: 10-9-84)

9/28/84 SUPPLEMENTAL Compliance with order of court relating to trial, fld. by pltff. (Revised list of witnesses and supplement to pretrial submission)

9/28/84 MEMORANDUM — Defts. amend their pretrial compliance by the addition of the attached instruction to Defts' proposed jury instructions, fld.

10/4/84 (22) MEMORANDUM in response to defts' motion for full or partial summary judgment or for judgment on the pleadings, fld. by pltff.

10/5/84 (23) ORDER (WLH) ORDERED that pltff's motion for reconsideration be and is GRANTED, and the Court's 6/8/84, order is vacated insofar as it grants deft. City's motion for summary judgment or judgment on the pleadings. FURTHER ORDERED that deft. City's motion for summary judgment or judgment on the pleadings be and is DENIED. cc: attys

10/5/84 DEPOSITION of James H. Praprotnik on 10/2/84, fld. on behalf of deft City of St. Louis,

10/9/84 (24) ORDER (WLH) ORDERED that defts' motion for summary judgment or for judgment on the pleadings be and is DENIED. cc: attys

10/9/84	MOTION for removal from trial docket, fld. by defts. (GRANTED, WLH) cc: attys
10/9/84	CAUSE CALLED parties announce ready. *Cause reset to Tuesday, November 13, 1984, 9:30 am.*
10/19/84	DEPOSITION of John J. Temporiti on 9/13/84, fld. on behalf of pltff.
10/19/84	DEPOSITION of Thomas R. Nash on 9/13/84, fld. on behalf of pltff.
10/19/84	DEPOSITION of William Lynn Edwards on 9/17/84, fld. on behalf of pltff.
10/19/84	DEPOSITION of William C. Duffe on 9/13/84, fld. on behalf of pltff.
11/2/84	MEMORANDUM — Defts. and pltffs granted an extension of time to November 5, 1984, to file supplemental compliance with pre-trial order. (WITHOUT OBJECTION, SO ORDERED, WLH) cc: attys.
11/5/84	SUPPLEMENTAL COMPLIANCE with pre-trial order, fld. by defts. (Defts' list of exhibits; Proposed jury instructions)
11/13/84	OBJECTIONS to certain exhibits, fld. by defts.
11/13/84	JURY TRIAL, (1st DAY), Parties present for jury trial, Pltff's evidence commenced but not concluded. Proceedings postponed until 11/14/84.
11/14/84	JURY TRIAL (2nd Day) Parties present, Pltff's evidence resumed but not concluded. Proceedings postponed until 11/15/84.
11/15/84	JURY TRIAL (3rd day), Parties present, Oral Motion of deft for directed verdict at close of pltff's case mad, argued and denied. Deft's evidence commenced but not concluded. Proceedings postponed until 11/16/84.
11/16/84	JURY TRIAL (4th day) Deft's evidence concluded. Pltff's evidence in rebuttal commenced and concluded. Arguments of counsel made. Jury charged and retires to consider verdict. Jury unable its verdict by is excused to 11/19 to resume deliberations.
11/19/84	JURY TRIAL (5th day), Parties and jury present. Jury again retires to consider its verdict. Verdict returned.
11/19/84	VERDICT, fld.
11/19/84	JUDGMENT, fld. IT IS ORDERED and ADJUDGED that in accordance with jury's verdict the pltff recover of the deft. City of St. Louis, on Pltff's claim arising out of the issues of right to free speech and to petition for redress of grievances and for loss of his job by reason of his layoff for the pretextual reason of lack of funds the sum of $30,000.00 IT IS FURTHER ORDERED that pltff. take nothing by his cause of action against defts. F. Hamsher, C. Kindelberger and D. Patterson, that the action be dismissed on the merits, and that defts recover of the pltff their costs of action.
11/29/84	MOTION for Judgment notwithstanding the verdict or in the alternative for a new trial, with Memorandum in support, fld. by deft. City of St. Louis, (ref: 12/27/84)
11/30/84	MOTION for attorney fees, fld. by pltff. (ref: 12/27/84)

12/6/84	BILL OF COSTS in the amount of $1,487.80, fld. by pltff.
12/11/84	MEMORANDUM in opposition of deft. City of St. Louis' motion for judgment notwithstanding the verdict or in the alternative, for a new trial, fld. by pltff.
	12/13/84 Motion for judgment notwithstanding the verdict or in the alternative for a new trial etc., which was fld. by deft. City of St. Louis, 11/29/84, memo in opposition fld. by pltff 12/11/84 & entire file submitted to Judge Hungate.
	12/20/84 Motion for attorney fees which was fld. by pltff 11/30/84 & entire file submitted to Judge Hungate.
12/27/84	ORDER (WLH), fld. ORDERED that deft. City of St. Louis shall respond within 10 days to pltff's motion for atty's fees. FURTHER ORDERED that deft City of St. Louis' motion for judgment notwithstanding the verdict or for new trial be and the same is denied. cc: attys.
1/2/85	BILL OF COSTS in amount of $1487.80 fld. by pltff., TAXED. SUGGESTIONS in opposition to pltff's motion for atty fees, fld. by defts.
	1/10/85 Pursuant to Court order fld. 12/27/84, suggestions in oppos. to pltff's motion for atty fees which was fld. by defts. 1/7/85 & entire file submitted to Judge Hungate.
1/24/85	NOTICE OF APPEAL, fld. by deft. Fee Paid
1/25/85	DELIVERED to USCA — 2 Cert. copies of Docket entries, Notice of appeal, and Order of 12/27/84, cc: attys.

2/8/85	ORDER (WLH) ORDERED that pltff's motion for atty's fees be and is GRANTED, and pltff is awarded $10,000.00 in att's fees from deft. City of St. Louis. cc: attys
2/8/85	RESPONSE to deft's suggestions in opposition to pltff's motion for atty fees, fld. by pltff. (LEAVE GRANTED, WLH)
2/11/85	DESIGNATION of record, fld. by deft-appellant.
2/20/85	TRANSCRIPT OF TRIAL dated 11/13/85, fld. by Pat Baeske, Court Reporter. (Volumes 1, 2, and 4, fld)
2/20/85	NOTICE OF APPEAL of Order entered 2/8/85, fld. by pltff. Fee Paid.
2/21/85	DELIVERED to USCA 8 — 2 certified copies of Notice of Appeal and docket entries. Also delivered 2 copies of order dated 2/8/85 and Docket fee payment notification form. cc: attys (ref: ________)
2/21/85	TRANSCRIPT of Trial dated 11/15/84 (volume #3), fld. by Pat Baeske, Court Reporter.
2/22/85	NOTICE OF CROSS-APPEAL of order entered 2/8/85, fld. by deft. FEE NOT PAID.
2/25/85	DELIVERED TO USCA8 — 2 certified copies of Notice of Cross-Appeal and docket entries. Also delivered 2 copies of order dated 2/8/85 and docket fee payment notification form. cc: attys (ref: ________)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287-C (4)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendant.

AMENDED COMPLAINT

Comes now the plaintiff, leave of Court first having been had and obtained and for his amended complaint states as follows:

1. This action arises under the First, Fifth and Fourteenth Amendments of the Constitution of the United States and Sections 1983, 1985, 1986 and 1988 of Title 42 of the United States Code; it is a civil rights suit for damages, attorney fees, injunctive and other relief arising out of the deprivation of the Constitutional Civil Rights of plaintiff caused by defendants acting individually and in their official capacities, and in conspiracy with each other and others. The matter in controversy exceeds the sum of the value of TEN THOUSAND DOLLARS ($10,000.00) exclusive of interest and costs. Jurisdiction is founded on the foregoing Sections of Title 42 United States Code and Sections 1331 and 1343, Title 28 of the United States Code.

PARTIES

Plaintiff

2. Plaintiff, James Praprotnik is a citizen of the United States, a resident of the City of St. Louis, Missouri, and is an employee of the classified service of the City of St. Louis holding permanent status.

Defendants

3. Defendant City of St. Louis is a political subdivision of the State of Missouri, a chartered city, a municipal corporation and exists by virtue of State law and has the capacity to sue or be sued.

4. Defendant Deborah Patterson is an employee of the City of St. Louis and is presently either Director or Acting Director of the Community Development Agency, an agency of the City of St. Louis.

5. Defendant Frank Hamsher is an employee of the City of St. Louis holding the position as Administrative Aide to the Mayor of the City of St. Louis and at some of the times mentioned herein was also Director of the Community Development Agency hereafter called CDA, an agency of the City of St. Louis.

6. Defendant Charles Kindelberger is an employee of the City of St. Louis and is the Director of Planning for CDA.

7. Defendants Hamsher and Kindelberger are sued in both their individual and official capacities and plaintiff further alleges that their actions as described herein were wilful and intentional.

8. All other defendants are sued in their official capacities only.

ALLEGATIONS OF FACTS

9. That plaintiff, James Praprotnik, was originally employed by the City of St. Louis, September, 1968, as a City Planner II in the Urban Design Section of the City Plan Commission and after other promotions was on August 3rd, 1984, promoted to the Management and Supervisory position of City Planner IV in CDA with a pay grade of 59-ME.

10. On April 28, 1980, plaintiff was suspended for period of fifteen (15) working days allegedly because he failed to follow the policy of CDA regarding secondary employment.

11. Plaintiff appealed the disciplinary action taken against him to the Civil Service Commission of the City of St. Louis and on such appeal was, on October 31, 1980, reinstated to his position with back pay and was to be given a written reprimand for his failure to secure a clear understanding concerning the Agency's policy on secondary employment.

12. On or about January 13, 1981, he was reprimanded by his appointing authority for, ". . . your having entered into consulting arrangements over the last several years without proper authority.", which reprimand was contrary to the directive and thrust of the decision of the Civil Service Commission.

13. Thereafter, plaintiff was required to make special reports on secondary employment which were not required of other personnel who were professional architects.

14. On or about July, 1981, duties normally handled by the plaintiff and his section were transferred to other CDA employees with less experience, training and qualifications and plaintiff's staff reduced from nine persons to three persons. Plaintiff made a verbal and written appeal to his supervisors which appeals were never acknowledged nor was any response given.

15. On or about July, 1981, plaintiff was moved from the payroll budgeted from City funds to a payroll budgeted from Federal Block Grant Funds.

16. On or about October 1, 1981, plaintiff was given his management performance evaluation and plaintiff was rated adequate or inadequate in all traits. Prior to this particular rating and prior to his appeal to the Civil Service Commission, a majority of plaintiff's General Evaluations were Superior ratings.

17. Plaintiff had never received an "A" (adequate) rating until after he filed the appeal to the Civil Service Commission.

18. Plaintiff filed an appeal to the Civil Service Commission from such rating.

19. In April, 1982, plaintiff was head of the Urban Design Section of CDA and on April 5, 1982, plaintiff was transferred without his consent from his Management and Supervisory position as City Planning Manager-Head of Design Review/Zoning with CDA to a position with the Commission on Heritage and Urban Design of the City of St. Louis.

20. Said transfer was in violation of the Civil Service Department of Personnel Rules and Regulations relating to layoffs. At the time of the transfer, defendants knew of an impending layoff of personnel from CDA and since Mr. Praprotnik was the most senior employee in his classification, he would have had to be retained. The transfer was done for the specific purposes of avoiding the requirements of the layoff procedure and to preserve positions for other employees of CDA having less seniority and professional experience.

21. The Commissioner of Heritage & Urban Design had an opening for a Historic Preservation Planner I or II, which was a junior staff position to existing staff and plaintiff was transferred to such job, a position for which plaintiff was grossly overqualified.

22. After plaintiff was transferred to the position in the Commission on Heritage and Urban Design, plaintiff was assigned duties which were primarily clerical in nature, contained no supervisory responsibilities and were at a level of performance greatly below those required in his classification as a City Planner Manager in Pay Grade 59-ME.

23. Plaintiff expressed his concern to his new appointing authority, Henry Jackson, about his duties and requested that he be assigned duties consistant with his job classification

because he felt there would be an effort to reclassify him to a lower pay grade position as a result of his being assigned duties at a lower grade, however, no change in assignment was made.

24. Henry Jackson, plaintiff's new appointing authority did not establish or modify plaintiff's existing management goals.

25. Civil Service Rules and Regulations of the Department of Personnel required that management goals be established for Civil Service Employees at the management level so that their job performance can be measured against established goals.

26. On or about November 17, 1981, plaintiff received a rating of Inadequate from defendant Henry Jackson containing a recommendation that his salary be decreased by one step (5%) and the following statement, ". . .Due to the fact that Mr. Praprotnik is no longer serving in the capacity of "City Planning Manager", I hereby recommend an immediate reclassification of his position."

27. Plaintiff's salary was reduced one step or 5% and plaintiff filed an appeal to the Civil Service Commission.

28. Plaintiff was laid off on December 30, 1983 allegedly for lack of funds, however, such reason was pretextual and not the real reason for layoff. The reason plaintiff was laid off was the continuing efforts of defendants to remove him from his position and to retain others who were more favored.

29. At all times mentioned herein, plaintiff had a property interest in his classified position as a City Planning Manager IV with the City of St. Louis and in his appeal rights to the Civil Service Commission.

30. Defendants and each of them acting under color of statute, ordinance, regulation, custom or usage in violation of 42 USC 1983 have caused plaintiff to be subjected to the deprivation of certain rights, privileges, and immunities secured by the Constitution and laws of the United States by depriving

plaintiff of equal protection of the laws, his right to freedom of speech, his property interest in his classified position and his property interest in his right of appeal to the Civil Service Commission in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution by one or more of the following acts of retaliation against plaintiff because of his exercise of his right of appeal to the Civil Service Commission and other constitutional rights, to-wit:

a) Giving plaintiff a written reprimand contrary to the thrust of the decision of the Civil Service Commission;

b) Requiring plaintiff to make special secondary employment reports;

c) Reducing plaintiff's staff from nine to three persons and transferring work formerly performed by his section to others with less experience and training;

d) Moving plaintiff from a payroll budgeted with City funds to a payroll budgeted from Federal funds;

e) Giving plaintiff a low service rating on or about October 1, 1981;

f) Transferring plaintiff from his management and supervisory position with CDA with a pay grade of 59-ME to a non-management and non-supervisory junior staff position with the Commission on Heritage and Urban Design;

g) Refusing to assign plaintiff duties consistent with his job classification;

h) Failing to establish goals against which his performance could be measured;

i) Giving plaintiff an inadequate rating and reducing his pay 5%;

j) Arranging the potential demotion of plaintiff from a City Planning Manager IV to Historic Preservation Planner I or II;

k) Recommending that plaintiff's position be reclassified to a lower grade;

l) Transferring plaintiff from CDA to the Heritage & Urban Design Commission in order to preserve jobs at CDA for less senior employees in the same classification all in violation of the layoff procedures of the City of St. Louis;

m) Placing a document in plaintiff's personnel file or files to the effect he was attempting to sabotage CDA;

n) Laying plaintiff off from his position on December 30, 1984, for the pretextual reason of lack of funds, and in furtherance of the conspiracy to remove plaintiff from his Civil Service position.

31. That defendants conspired with each other and others unknown to the plaintiff to interfere with plaintiff's civil rights and to deprive him of rights and privileges guaranteed by the First, Fifth and Fourteenth Amendments and 42 USC 1985 by their acts as alleged herein.

32. That defendants and each of them although they knew of the actions of others to deprive plaintiff of privileges and immunities guaranteed by the United States Constitution failed and neglected to prevent such actions all in violation of 43 USC 1986.

33. Plaintiff states that by reason of the illegal and wrongful acts of defendants and each of them he has lost pay, earnings and benefits of a reasonable value of TWENTY THOUSAND DOLLARS ($20,000.00), that by reason of his layoff he will lose pay earnings and benefits in the future, that he has been damaged in his professional reputation as a Registered Architect and City Planning Manager, that he and his family have been subjected to a great deal of stress and strain all as a result of the willful and intentional acts of the defendant.

WHEREFORE, plaintiff makes demand for trial by jury and prays judgment against the defendants for actual damages in the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) and for punitive damages in the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) against the individual defendants Frank Hamsher and Charles Kindelberger.

/s/ CHARLES R. OLDHAM 13616
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287-C (4)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

DEFENDANTS' ANSWER TO AMENDED COMPLAINT

(Filed June 6, 1984)

Come now Defendants and for their answer to Plaintiff's Amended Complaint state as follows:

1. Defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 15, 17, 18, 19, 24, 25, 26, and 27 of plaintiff's amended complaint.

2. Defendants deny the allegations contained in paragraphs 13, 14, 16, 20, 21, 28, 29, 30 (a) through (n), 31, 32, and 33 of plaintiff's amended complaint.

3. Defendants are without sufficient knowledge to form a belief as to the truth of the allegations contained and set forth in paragraphs 22 and 23 of plaintiff's petition and, therefore, denies the same.

4. With regard to paragraph 7 of plaintiff's amended complaint, defendants admit that defendants Hamsher and Kindelberger are sued in both their individual and official capacities but deny that their actions were wilful and intentional.

5. With regard to paragraph 12 of plaintiff's complaint, defendants deny that the reprimand given to plaintiff, as set forth in said paragraph 12 was contrary to the directive and thrust of the decision of the Civil Service Commission. Defendants admit the remaining allegations of said paragraph 12.

WHEREFORE, having fully answered, defendants pray to be hence dismissed together with their costs.

AFFIRMATIVE DEFENSE

For their first affirmative defense, defendants Hamsher, Kindelberger and Patterson state that at all times pertinent hereto they, and each of them, acted in good faith and with a reasonable belief in the validity of their actions, as well as in the validity of the Charter provisions, ordinances, rules, regulations and guidelines pursuant to which their actions were taken.

JAMES J. WILSON
City Counselor #18356

/s/ Judith A. Ronzio
Associate City Counselor
Attorney for Defendants
314 City Hall
St. Louis, MO 63103
622-3361

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287 C (3)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

MOTION TO ADD ADDITIONAL PARTIES

Comes now plaintiff, James Praprotnik, and moves this Court to permit him to add as additional parties, (1) the Honorable Vincent Schoemehl, Mayor of the City of St. Louis, (2) Mr. Thomas Nash, Director of Public Safety, (3) Mr. William Lynn Edwards, Administrative Aide to the Mayor, and (4) Mr. John Temporiti, Administrative Aide to the Mayor.

Plaintiff requests permission to add these parties under Rule 19 of the Civil Rules of Civil Procedures because in their absence complete relief cannot be accorded among those already parties. Specifically, said individuals are necessary if plaintiff is to avoid future litigation. In this particular case only the actions of Kindleberger, Patterson and Hamsher may be considered.

/s/ CHARLES R. OLDHAM 13616
ANNE V. MALONEY 29272
Attorneys for Plaintiff
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St. Louis, Missouri 63101
Phone: 231-0464

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287 C (3)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

MOTION TO ADD ADDITIONAL DEFENDANTS

Comes now the plaintiff and for his motion to add additional defendants states as follows:

1. This action originally was instituted against certain individual defendants and the City of St. Louis, however the Court has dismissed the cause of action against the City of St. Louis and left only certain individual defendants. Since other individuals were actively involved in their capacity as City employees and as individuals in their actions against the plaintiff, it now becomes necessary for plaintiff to amend his petition and to include certain additional defendants to cover all parties who undertook any adverse action against plaintiff. If plaintiff is not permitted to include these individuals, the individual defendants may contend that the other defendants are the guilty parties. Because of the dismissal of the City, the additional named defendants are essential and necessary parties.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287 C (3)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

MOTION TO AMEND INTERLOCUTORY ORDER OF AUGUST 17TH, 1984

Comes now James Praprotnik, plaintiff herein and moves this Court pursuant to 28 USCA, Section 1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure, for an order amending its order of August 17th, 1984, wherein the Court denied plaintiff's motion to add additional parties defendant and to include in said order a statement that:

1. Said order involves a controlling question of law as to which there are substantial grounds for difference of opinions, and

2. An immediate appeal from an order may materially advance the ultimate determination of this litigation.

3. This motion is based upon the files and records herein of plaintiff's brief filed herewith.

Accordingly, plaintiff may have the right to file another lawsuit against Nash, Schoemehl, Temporiti and Lynn Edwards. Since their presence is necessary to completely resolve all issues, these defendants should be named as additional necessary parties.

Plaintiff also moves that his motion to add additional parties be allowed under Rule 20 of the Federal Rules of Civil Procedure relating to permissive joinder. It is clear from the allegations set forth in the amended complaint and in the proposed second amended complaint that the acts arise out of the same transactions or series of transactions and involve common questions of law and fact all as set forth in the attached amended complaint. Plaintiff attaches as a part of this motion his proposed Second Amended Complaint.

Plaintiff states that there would be no prejudice to the defendants by including them as additional named defendants at this stage of the proceedings and that the granting of such motion would promote the interest of justice.

/s/ CHARLES R. OLDHAM 13616
ANNE V. MALONEY 29272
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St. Louis, Missouri 63101
Phone: 231-0464

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287 C (3)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO AMEND INTERLOCUTORY ORDER OF JUNE 8, 1984 WHEREIN THE COURT DISMISSED THE CITY AS A NAMED DEFENDANT AND ITS ORDER OF AUGUST 17, 1984 DENYING PLAINTIFF LEAVE TO ADD ADDITIONAL PARTIES DEFENDANT

This is a suit brought by plaintiff against the City of St. Louis and several individual defendants wherein plaintiff alleges the defendants violated certain of his constitutional rights under color of law, custom or usage.

Plaintiff's original complaint was filed in the fall of 1983, and on December 5th, 1983, defendants filed their motion for summary judgment or in the alternative for judgment on the pleadings. Subsequently, on March 19th, 1984 plaintiff was granted leave to amend his complaint. Next, on June 6th, 1984, the City was granted leave to file its amended answer and at the same time requested that their motion for summary judgment or in the alternative for judgment on the pleadings be applied to the amended complaint of March 19th. The case was set for trial June 11th, 1984. Thereafter on June 8th and prior to the time that plaintiff would have had an opportunity to respond to the motion for summary judgment or alternatively for judgment on the pleadings as applied to the amended complaint, the

Court entered its ruling granting the motion for summary judgment or for judgment on the pleadings for the City of St. Louis. On June 14th, the case was removed from the trial docket and reset for hearing on October 9th. On August 8th, plaintiff filed his motion for leave to add additional defendants contending that they were necessary because of the dismissal of the City as a named defendant. The City filed their objections on August 17th and the Court denied plaintiff's motion to add additional named defendants on the same day.

In his amended complaint, plaintiff alleged the defendants (City of St. Louis, Hamsher, Kindelberger and Patterson) under color of law, custom, practice, etc., had conspired with each other to deprive him of a constitutional right by reprimanding him, giving him low ratings, transferring him from a management-supervisory position to a primarily clerical position and ultimately laid him off in furtherance of their scheme or policy to remove him from his position because of an appeal to the Civil Service Commission and to retain others more favored.

Hamsher was the former Director of CDA and is presently an Administrative Aide to the Mayor, Defendant Debra Patterson is the present Director of CDA, Defendant Charles Kindelberger is Director of Planning at CDA and the number two man in the agency. Depositions of plaintiff, Brewster and Killen reveal that other high city government officials were involved in the scheme. Bill Duffe, Director of Personnel directed the transfer, Thomas Nash, Director of Public Safety laid plaintiff off. The actions against plaintiff began in January of 1981 when he was reprimanded by Donald Spaid, former Director of CDA and continued for almost four years until December 31, 1983 when plaintiff was laid off.

ARGUMENT

THE COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY FOR JUDGMENT ON THE PLEADINGS FOR THE FOLLOWING REASON:

1. The Court order was entered before plaintiff was given an opportunity to respond to the motion for summary judgment or judgment on the pleadings filed in behalf of the City of St. Louis.

The local rules provide that a party shall have five (5) days in which to respond to motions. In this situation, plaintiff was notified in open court of the City's desire to have their original motion to be considered as refiled against the amended complaint on June 6th. On June 8th the Court issued its order granting the City's motion to dismiss as to the City of St. Louis. It is the contention of plaintiff that the Court was premature and should have given plaintiff an opportunity to respond to the City's motion for summary judgment or to file an amended pleading.

2. There is a substantial difference of opinion as evidenced by recent decisions of the Eighth Circuit as to whether or not summary judgment and or judgment on pleadings is appropriate where a plaintiff has alleged that high governmental officials have engaged in various acts over a long period of time to deprive such a plaintiff of protected constitutional rights.

In this case, plaintiff alleged a series of continuing acts covering a period from January, 1981 to December 31, 1983 by high government officials alleging that they had engaged in certain acts to punish him for his appeal to the Civil Service Commission and to remove him from his job and retain others more favored and thereby deprive him of his property interest in his job, all in violation of his Constitutional rights.

One of the first cases to discuss responsibilities of a municipality for actions of officials was *Jennings v. Patterson,* 488 F.2d 436 (5th Cir. 1974).

In this case the Court held that under its prior understanding of the law the actions of City officials in failing to dismantle a fence constituted action under "color of law" sufficient to create liability for the City, however, under the ruling in *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L. Ed. 2d 492 (1961) cites could not be held responsible under Section 1983. The allegations held to be sufficient alleged, plaintiffs were denied access to a public street by a barricade erected by certain private individuals and the City of Dadeville, Alabama and its governing officers failed to remove the barricade.

Monroe v. Pape, supra, was overruled by *Monnell v. New York City Department of Social Service,* 436 U.S. 658, 56 L.Ed.2d 611, 98 Sup. Ct. 2018 (1978). In this case, the Court held that Section 1983 imposed liability on a government which under color of some official policy violated the constitutional rights of an individual. *Monell* specifically held that the policy need not receive formal approval through the governmental official decision making channels. It pointed out that although not authorized by written law that certain practices by high officials could well constitute a custom or usage with the force of law.

The question then is under what circumstances do actions of high officials of the City of St. Louis create liability for the City itself.

In *Owens v. Haas,* 601 F.2d 1242, 1979, 2nd Cir., a federal prisoner who was housed in the County Jail under contract between the County and the United States was beaten and severally injured. The prisoner filed suit alleging a deliberate indifference by the County to plaintiff's constitutional rights and the failure to train its employees. The District Court granted a motion for summary judgment and on appeal the Second Circuit reversed. The Court stated at page 1246:

> While some casual link must be made between the county's failure to train and the violation of constitutional rights, a single brutal incident such as this may be sufficient to suggest that link.

See also *Leite v. City of Providence,* 463 F.Supp. 585, 590-91.

In the case of *Quinn v. Syracuse Model Neighborhood Corporation,* 613 F.2d 438 (1980), the plaintiff alleged that the Mayor of the City of Syracuse had undertaken a campaign to stigmatize his good name by alleging that he had taken money. The court stated at page 488:

> "...But, although the Supreme Court in *Monnell* declared that a municipality could not be held liable on "on a *respondeat superior* theory" id at 691, 98 Sup. Ct. 2018, it explicitly recognized that a "government's policy or custom" may be promulgated either "by its law makers or by those whose edicts or acts may fairly be said to represent official policy."

In the *Quinn* case, the plaintiff alleged that the defendants acting in concert, labored to create a public impression that he was criminally responsible for the missing funds and that this caused him to suffer great damage to his reputation, his standing in the community, etc.

The court held that if the plaintiff could prove that the Mayor directed a campaign to stigmatize him, he would state a claim for municipal liability under 42 U.S.C. 1983.

The Eighth Circuit has also had an opportunity to consider what acts would create municipal liability in the recent case of *Westborough Mall v. City of Cape Girardeau, Mo.,* 693 F.2d 733 (1982). The courts held that summary judgment is justified only when, by viewing facts and inferences which may be derived therefrom in light most favorable to the nonmoving party, the court is convinced that there is no evidence to sustain a recovery under any discernable circumstances.

In this case, the plaintiffs contended the City acted illegally to deprive them of their zoning rights without due process of law. The District Court granted a summary judgment against the City primarily, because in its view, no official action was taken by the City with respect to the alleged reversion of plaintiff's zoning permit. On appeal, the City argued that no City action was taken because the city managers actions concerning the reversion were merely an expression of his own opinion and did not result in any change in the status of plaintiff's zoning. The court held that in the context of a motion for summary judgment this contention could not be accepted. The court stated at page 741:

> ...the actions by City officials in this case were not merely isolated incidents, (citations omitted) but rather may have represented official policy of the City concerning the status of plaintiff's zoning....We find that the plaintiffs have presented sufficient evidence that the reversion of their zoning "was caused by the official conduct of...those whose acts may fairly be said to represent official policy, *Owens v. City of Independence,* 589 F.2d 335, 337 (8th Cir. 1978).

The Eighth Circuit also considered a similar problem in the case of *Sanders v. St. Louis County,* 724 F.2d 665 (1983). In this case, the court held that a warden's denying an inmate's request for transfer was insufficient to establish liability of the County. In this case, two low ranking county employees told a prisoner that they were not obligated to provide medical treatment for "writ writers". The court held these comments by two low ranking county employees were insufficient to establish a pattern from which a custom or policy could be inferred.

In the instant case, we have a custom and practice by a number of city official covering a period of almost four years during which plaintiff was subjected to a number of acts as alleged in Paragraph 30 of his complaint. High government officials were involved, these being Donald Spaid, former Director of CDA; Frank Hamsher, former Director of CDA, and presently Administrative Aide to the Mayor; Deborah Patterson, Director of CDA; Arthur Jackson, former Commissioner of the Division of Heritage & Urban Design; Mr. Killen, Acting Commissioner of the Division of Heritage & Urban Design; and Tom Nash, Director of Public Safety. The activities of Nash, Killen and Jackson are set forth in the deposition of Robert A. Killen taken on October 31st, 1983, the activities of Frank Hamsher are described in his deposition taken on July 6th, 1983 and the activities of Spaid, Kindleberger and Hamsher are set forth in detail in the deposition of Harold Brewster taken December 9th, 1983. These depositions along with the allegations in the complaint are sufficient to establish facts from which a jury could find that a policy existed to deprive plaintiff of his job and retain others more favored. High officials are involved over a period of three to four years. This was not an isolated incident by one individual, but involved the concerted action by a large number of high governmental officials, as alleged in plaintiff's petition and supported by evidence in various depositions to deprive plaintiff of his job and retain others more favored.

Since a substantial dispute exist under the decisions of the Eighth Circuit and under the decisions of other circuits as to whether these acts are sufficient to create municipal liability, the court should grant plaintiff's motion to amend the interlocutory order of June 8th, 1984.

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION TO ADD ADDITIONAL PARTIES

Plaintiff filed a motion to add additional parties defendant since the City had been dismissed as a named defendant. Plaintiff alleged in his motion that it was essential to include all these parties since some of these officials might be able to point the finger at some other individual and say that they were responsible. Prior to the court's granting the defendant's motion to dismiss the City there was no need to include these other named individuals.

All the parties are represented by the same counsel, there are no new facts involved, little if any additional discovery needs to be obtained, no prejudice to the present defendants was shown and under all the circumstances in this case, plaintiff should have been permitted, in the interest of justice, to amend his petition to include these essential and necessary parties.

Plaintiff contends that the additional named defendants should have been joined under Rule 19, Federal Rules of Civil Procedure which provides that "a person who is subject to service of process and whose joinder would not deprive the Court of jurisdiction over the subject matter shall be joined as a party in the action if, (1) in his absence complete relief can not be accorded among those already a party.

The Supreme Court stated that "the impulse is towards entertaining the broadest possible scope of action, consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encoraged." The *United Iron Workers of America v. Gibbs,* 1966, 1138, 383 U.S. 715, 724, 16 Law. Add. 218. Plaintiff contends that under the circumstances that the additional named defendants are essential and necessary parties and plaintiff should have been permitted to add them as set forth in his second amended complaint attached to and made a part of the motion to add additional parties.

Plaintiff also contends that he should have been permitted to add additional parties under the permissive joinder provisions of Rule 20. Rule 20 permits a single action of all persons asserting or defending against a joint or alternative right to relief that arises out of a same transaction or occurrence and presents common questions of law or fact. The purpose of the rule is to promote trial convenience and to expedite the final determination of disputes thereby preventing multiple lawsuits.

The amended petition clearly indicates that plaintiff's claim is premised on the same transaction or series of occurrences and involve common questions of law and fact. In the interest of justice the Court should have permitted plaintiff to add other City officials involved in the occurrences as parties defendants, particularly in view of its recent decision dismissing the City as a named defendant. In *McMillian v. I.V. O. W. Corporation,* D.C. Vt. 1980, 495 F.Supp. 1134, it was held appropriate to join as a named defendant, the corporate officer who was personally involved in the tortious conduct of the corporation and who appeared as a witness at trial. In this particular case, the court permitted the corporate officer to be joined upon completion of the trial since it did not appear that he would be prejudiced by the joinder despite the late stage of the proceedings.

The same is true in this particular situation, none of the parties would be prejudiced by the joinder of the named additional defendants.

WHEREFORE, plaintiff respectfully request the Court to amend its interlocutory orders of June 8th and August 17th, 1984 to permit an appeal to the U. S. Court of Appeals for the Eighth Circuit or in the alternative that the Court grant plaintiff's motion to add additional parties.

/s/ Charles R. Oldham 13616
Anne v. Maloney 29272
Attorneys for Plaintiff
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Phone: 231-0464

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
OFFICE OF THE CLERK
1114 Market Street
St. Louis, Missouri 63101

EYVON MENDENHALL
Clerk

PHONE: 314-425-4315
FTS 279-4315

September 6, 1984

Re: JAMES H. PRAPROTNIK
vs.
CITY OF ST. LOUIS, et al
No. 83-0287C(3)

Charles R. Oldham
317 N. 11th #1210
St. Louis, MO. 63101

Judith A. Ronzio
Associate City Counselor
314 City Hall
St. Louis, MO. 63103

x Enclosed is copy of an ORDER entered this date by the Honorable William L. Hungate in the above-styled cause.

____ Enclosed is copy of an ORDER and MEMORANDUM entered this date by the Honorable William L. Hungate in the above-styled cause.

____ Enclosed is copy of a MEMORANDUM AND ORDER entered this date by the

Honorable William L. Hungate in the above-styled cause.

Very truly yours,

EYVON MENDENHALL, CLERK

By: /s/ P. McDaniel
Deputy Clerk

Enclosure(s)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287C(3)

James H. Praprotnik,
Plaintiff,

v.

City of St. Louis, et al.,
Defendants.

ORDER

(Filed Sept. 6, 1984)

This matter is before the Court on plaintiff's motion to amend interlocutory order of August 17, 1984 (denying plaintiff's motion to add additional parties), and motion to amend interlocutory order of June 8, 1984 (granting defendants' motion for summary judgment on the pleadings as to defendant City of St. Louis). Counsel for defendants appeared at informal matters to oppose plaintiff's motions.

This action was filed on February 8, 1983, after which defendants moved for summary judgment or, alternatively, judgment on the pleadings. Following plaintiff's response, but before the Court ruled upon defendants' motion, plaintiff filed an amended complaint.

On June 6, 1984, defendants renewed their motion as to the amended complaint. On June 8, 1984, three days before trial, the Court entered its order from which plaintiff seeks interlocutory appeal. Plaintiff then sought leave to add parties, but did not seek reconsideration of, or file any response to, the Court's order as to the City of St. Louis.

In the memorandum accompanying his August 17, 1984, motions to amend, plaintiff asserts for the first time that the Court erred in granting the motion before plaintiff was given an opportunity to respond. The Court would have considered, and would still consider a memorandum offered by plaintiff addressed to this point; to date, however, the Court has received neither a memorandum or a request to allow one. The Court is not persuaded that the orders in question are appropriately certified as a matter for interlocutory appeal. Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion to amend interlocutory order of August 17, 1984, be and the same is denied.

IT IS HEREBY FURTHER ORDERED that plaintiff's motion to amend interlocutory order of June 8, 1984, be and the same is denied.

Dated this 6th day of September, 1984.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287 C (3)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

MOTION TO COMPEL ANSWERS TO QUESTIONS PROPOUNDED IN DEPOSITIONS OF VINCENT SCHOEMEHL, JOHN TEMPORITI AND THOMAS R. NASH

Comes now plaintiff, James Praprotnik, by his attorney, Charles R. Oldham, and for his motion to compel answers to certain questions propounded at the depositions of Vincent Schoemehl, John Temporiti and Thomas R. Nash states as follows:

Plaintiff recently partially took the depositions of Mayor Schoemehl, John J. Temporiti, Chief of Staff for Mayor Vincent Schoemehl and Thomas R. Nash, Director of Public Safety for the City of St. Louis. The testimony adduced at the depositions indicated that Thomas R. Nash is the appointing authority for the Commissioner of Heritage & Urban Design and is the person who laid off Mr. Praprotnik on December 30th, 1983 allegedly for lack of funds.

Recently a Mr. Arnold Montgomery was appointed to the position of Commissioner of Heritage & Urban Design by Thomas Nash and plaintiff believes that Montgomery did not have the required qualifications for the job and that his salary is in excess of the amount of the salary that was paid to Mr. Praprotnik.

Mr. Praprotnik in his amended complaint alleged among other things that his reason for his layoff were pretextual in nature and that plaintiff was laid off as a result of the continuing efforts of defendants to remove him from his position and to retain others who were more favored.

Plaintiff alleges that his questions were designed to illicit information as to whether or not the cost of Mr. Montgomery was equal to or in excess of the salary paid to plaintiff and whether or not Mr. Montgomery was qualified for the position for which he was appointed all of which would provide information as to whether or not defendants had continued to punish plaintiff for his appeal to the Civil Service Commission and in furtherance the defendants actions to retain others who were more favored and whether or not the reasons given for his layoff were pretextual.

VINCENT SCHOEMEHL

Vincent Schoemehl refused to answer the following -

1. Did you participate in any way in the appointment of Arnold Montgomery as Director of the Division of Heritage and Urban Design?

2. Are you aware of the qualifications of Arnold Montgomery for this position he now holds?

3. Did Mr. Nash recommend to you the appointment of Arnold Montgomery as the then titled Director of the Division of Heritage and Urban Design?

4. Do you remember any discussion in which you and Mr. Hamsher and Mr. Edwards were involved were you discussed the person that would be transferred or laid off at CDA?

5. How long have you known Arnold Montgomery?

JOHN J. TEMPORITI

Mr. Temporiti refused to answer the following questions.

1. Are you familiar with the appointment of Arnold Montgomery as Commissioner of Heritage & Urban Design?

2. Mr. Temporiti did you discuss the appointment of Arnold Montgomery with any body other than the Mayor?

3. Did you discuss the appointment of Arnold Montgomery with Mr. Nash?

4. Did you discuss the appointment with Mr. Edwards?

5. Did you discuss the appointment with Mr. Duffe?

6. Were you in any way involved in his (Harold Brewster's) transfer or selection for the Parks Department? (Mr. Brewster was Second in Command at CDA and was laid off and then transferred)

THOMAS R. NASH

Thomas R. Nash refused to answer the following questions.

Mr. Nash testified that he made the appointment of Arnold Montgomery to the position of Commission of Heritage and Urban Design. He was then asked -

1. Do you know what the qualifications for the position were?

2. Did you get any flak from any member of your Board on the appointment of Mr. Montgomery to that position?

3. Did you discuss the appointment of Mr. Montgomery with any body from the Mayor's office?

4. What is the salary that Mr. Montgomery is making?

5. Did you get any inquiries from the press concerning the appointment of Mr. Montgomery?

6. When was Mr. Montgomery appointed?

7. Who was the appointing authority at the time the typist clerk was hired?
(There is testimony that an additional typist clerk had been hired in the office of Heritage and Urban Design).

Plaintiff states that the above questions which the individuals refused to answer could provide information or could lead to information concerning the issues involved in the lawsuit as to whether or not the layoff of Mr. Praprotnik was pretextual and secondly, whether or not it was in furtherance of their policy to remove Mr. Praprotnik and retain others more favored.

WHEREFORE, plaintiff requests that Vincent Schoemehl, John J. Temporiti and Thomas R. Nash be directed and ordered to answer the questions listed above and be further ordered and directed to answer questions of a similar nature on the same subjects.

Plaintiff further requests that he be allowed the cost of this action and reasonable attorney fees.

/s/ CHARLES R. OLDHAM 13616
ANNE V. MALONEY
Attorneys for Plaintiff
317 N. 11th Street, Suite 1210
St. Louis, Missouri 63101
Phone: 231-0464

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287 C (3)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

MOTION TO COMPEL ANSWERS TO QUESTIONS PROPOUNDED IN DEPOSITIONS OF VINCENT SCHOEMEHL, JOHN TEMPORITI AND THOMAS R. NASH

Comes now plaintiff, James Praprotnik, by his attorney, Charles R. Oldham, and for his motion to compel answers to certain questions propounded at the depositions of Vincent Schoemehl, John Temporiti and Thomas R. Nash states as follows:

Plaintiff recently partially took the depositions of Mayor Schoemehl, John J. Temporiti, Chief of Staff for Mayor Vincent Schoemehl and Thomas R. Nash, Director of Public Safety for the City of St. Louis. The testimony adduced at the depositions indicated that Thomas R. Nash is the appointing authority for the Commissioner of Heritage & Urban Design and is the person who laid off Mr. Praprotnik on December 30th, 1983 allegedly for lack of funds.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Article XVIII Civil Service*

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* City Counselor Ops.: 7802, 8175, 8362, 8387, 9137, 9346, 9346a, 9410, 9627, 9663, 9711, 9927, 9996, 10293, 10298, 10380, 10519

Cases:

> The provisions for indefinite tenure and appointments according to merit apply only to the competitive positions in the classified service and not the excepted positions. *Riley v. Holland,* 243 S.W. 2d 79, 262 Mo. 682 (1951).
>
> After September 16, 1941 no one has an absolute rifht to occupy a classified service position without further examination. *Bokern v. Scearce,* 174 S.W. 2d 355, 237 Mo. App. 526 (1943).
>
> The comptroller cannot control the policy or normal functioning of the civil service commission. *Kirby v. Nolte,* 164 S.W. 2d 1, 349 Mo. 1015 (1942).
>
> This article did not repeal the maximum salary limitation in article 8 § 8. *Simmons v. City of St. Louis,* 264 S.W. 2d 928 (1954).
>
> The director of personnel does not have a right of appeal from a decision by the commission. *Searce v. Simmons,* 294 S.W. 2d 673 (1956).
>
> Within the framework of this article and the charter an ordinance changing the title and salary of employees is valid. *Sanders v. City of St. Louis,* 303 S.W. 2d 925 (1957).
>
> Ordinances pertaining to the civil service must be recommended by the civil service commission to the board of aldermen. *Abernathy v. City of St. Louis,* 313 S.W. 2d 717 (1958).
>
> Notice of dismissal by mail did not satisfy the requirements of the State Merit System Law. *Wolf v. Missouri State Training School for Boys,* 517 S.W. 2d 138 (1974).
>
> A Statutory program for avoiding racial discrimination in employment was not unconstitutional as applied to the City of

Section 1 Definitions.

The terms defined in this section, when used in this article, have the following meanings except where the context clearly requires otherwise:

City Counselor Ops.: 8414, 8494, 10099

(a) "Appointing authority" means any person or group of persons having power by law or ordinance, or by lawfully delegated authority, to make appointments to any position in the city service;

City Counselor Ops.: 9548

> St. Louis. *City of St. Louis v. Missouri Commission on Human Rights,* 517 S.W. 2d 65 (1974).
>
> City charter provision limiting salaries of city employees and officials to $25,000 did not violate the equal protection clause of the Fourteenth Amendment. *Bruce v. Scearce,* 390 F. Supp. 297 (1975).

McQuillin:

> 12.76—12.81a Civil Service Generally

History:

> Submission Ordinance No. 42021
> Submission Ordinance Approved April 4, 1941.
> Amendment Substance: repealing Sections 1 to 13; enacting a new scheme for a civil service system of personnel employment and administration for the City, in 30 new sections.
>
> Voter Adoption Date: September 16, 1941.
>
> Submission Ordinance No. 49103
> Submission Ordinance Approved August 9, 1958.
> Amendment Substance: repeal of prior Article XVIII amendment, and substituting in lieu thereof a new comprehensive detailed classified service system.
>
> Voter Rejection Date: November 4, 1958.

(b) "City service" or "service of the city" means all positions as herein defined, that are subject to control and regulation by the City of St. Louis as a municipal corporation or any of its officers or other agencies as such;

City Counselor Ops.: 8616

(c) "Class" or "class of positions" means a definitely recognized kind of employment in the classified service designed to embrace all positions sufficiently alike to be treated alike;

City Counselor Ops.: 7896

(d) "Classified service" means all positions in the city service except those specifically placed in the unclassified service as herein defined;

City Counselor Ops.: 7635, 8185, 8616, 10111

(e) "Compensation" means the salary, wages, fees, allowances, and all other forms of valuable consideration, earned by or paid to any employe by reason of service in any position, but does not include any allowance for expenses authorized and incurred as incidents to employment;

City Counselor Ops.: 9032

(f) "Competitive position" means any position in the classified service not expressly designated as an excepted position in this section;

(g) "Examination" means all the tests of fitness, taken together, that are applied to determine the fitness of applicants for positions of any class;

(h) "Excepted position" means any position in the classified service not subject to the provisions of this article requiring competitive tests of fitness for appointment and such other provisions as, by their terms, apply specifically to competitive positions alone. All such positions, however, shall be subject to all the other provisions of this article insofar as consistent with law and with this exception. The following described positions, and no others, shall be deemed to be excepted positions:

(1) all positions filled by election of the people;

(2) all positions of heads of principal departments and of independent agencies, that are filled by appointment by the mayor;

(3) one position of executive secretary and one position of secretary and stenographer to the mayor;

(4) all positions of paid members of boards;

(5) all officers and employes of the board of aldermen;

City Counselor Ops.: 7608, 7615, 9192, 9508, 10109, 10384

Cases:

> The excepted positions in this subsection are not subject to the indefinite tenure provisions. *Riley v. Holland,* 243 S.W. 2d 79, 362 Mo. 682 (1951).

History:

> Submission Ordinance No. 57299
> Submission Ordinance Approved February 4, 1977
> Amendment Substance: to amend Charter of the City by changing the requirements of Section 1(h)(3) of Article XVIII and permitting the Mayor to appoint three (3) administrative assistants as "excepted positions" in addition to present positions of executive secretary and secretary and stenographer.
> Voter Rejection Date: April 5, 1977.

(i) "Employe" means a person legally occupying a position;

City Counselor Ops.: 10111

(j) "Grade" means all positions or classes of positions in the city service that are determined to be of the same level with respect to the difficulty and responsibility of their duties and any other measure of value, and for which the same rate or scale of rates of compensation is prescribed, under the provisions of this article;

(k) "Position" means any appointive or elective office, and any employment, or two or more of such offices and employments the duties of which call for services to be rendered by one person;

City Counselor Ops.: 10111

(l) "Test of fitness" means any means or measure for determining the merit and fitness of persons for original appointment or promotion to positions of a class; and

(m) "Unclassified service" means all positions not subject to the provisions of the charter, ordinances and civil service rules relating exclusively to positions in the classified service, and includes positions, as follows, and no others:

(1) all positions of members of boards, commissions, or committees serving without compensation;
(2) all other positions in which services are rendered without compensation;
(3) all officers and employes of the board of aldermen.

City Counselor Ops.: 7635, 8185, 8616, 10109, 10111

Section 2 Purpose and basic requirements of this article.

It is the purpose of this article to provide a modern and comprehensive system of personnel administration for the city, whereby economy and effectiveness in the personal services rendered to the city, and fairness and equity to the employes and the taxpayers of the city, alike, may be promoted. To accomplish this end the provisions of this article shall be liberally construed. The following principles and policies shall be observed, as basic requirements:

City Counselor Ops.: 8098, 8368, 8414, 8494, 10099

Cases:

> The court may decide that certain standards of fitness are unreasonable. *Mahon v. Scearce,* 228 S.W. 384 (1950).

(a) Merit and fitness. All appointments and promotions to positions in the service of the city and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be on the sole basis of merit and fitness, which, so far as practicable, shall be ascertained by means of competitive tests, or service ratings, or both.

City Counselor Ops.: 8381

Cases:

> A Statutory program for avoiding racial discrimination in employment was not unconstitutional as applied to the City of St. Louis. *City of St. Louis v. Missouri Commission on Human Rights,* 517 S.W. 2d 65 (1974).

(b) Rates of pay. Fair and equitable rates of pay shall be provided with due consideration of both the employes and the taxpayers and with due observance of the principle of like pay for like work, and suitable differences in pay for differences in work.

Cases:

> The "like pay for like work" requirement of the city charter was not violated by difference between compensation paid to members of security force at airport and compensation paid to members of city police force because the state, not the city, had control over the city police force. *Slater v. City of St. Louis,* 548 S.W. 2d 590 (1977).
>
> City is not required to pay airport police at the same rate as metropolitan police officers, whose pay is

determined by the State. *Slater v. City of St. Louis,* 548 S.W. 2d 590 (1977).

(c) Employes' interests. Considerations shall be given to the desires and interests of the employes insofar as consistent with the best interests of the city as an employer, and of the public served.

(d) Nature of city service. The city service, so far as practicable, shall be made attractive as a career, and each employe shall be encouraged to render his best service in willing compliance with the provisions of this article.

City Counselor Ops.: 10109

Section 3 Scope of civil service rules.

To give effect to the purpose and requirements set forth in the next preceding section, the civil service rules, hereinafter required to be adopted, shall provide for the following things, among others, with relation to the classified service as defined herein:

City Cunselor Ops.: 7979, 8098, 8330, 8494, 10099

(a) Classification plan. For a systematic classification plan providing for the classification of all positions on the basis of their duties, responsibilities, and resulting qualification requirements; for definitions of the classes in the classification plan; for the allocation of all positions to their appropriate classes in the classification plan; and, for the amendment and continuous administration of the classification plan. No person shall be employed or paid in any position until the class of such position has been determined by allocation of the position by the director to its appropriate class;

(b) Compensation plan. For development and recommendation to the mayor and aldermen of a systematic compensation plan, and amendments thereto from time to time as deemed necessary, to provide for uniform scales of compensation for all positions of the several classes, by grades, with due relationships among scales of compensation of the several grades, and for the continuous administration of such compensation plan as is adopted by ordinance;

History:

Submission Ordinance No. 57154
Submission Ordinance Approved March 17, 1976.
Amendment Substance: changing requirements of Article XVIII, Secs. 3(b) and 4(a) so as to require inclusion of "excepted" positions such as the Mayor and members of the Board of Aldermen.
Voter Rejection Date: November 2, 1976.

(c) Competitive examinations. For determining merit and fitness for appointment and promotion to competitive positions by means of competitive examinations held after due public notice. The tests of fitness in such examinations shall be practical in character and designed fairly to measure the relative qualifications of candidates for positions of the several classes;

City Counselor Ops.: 8892

Cases:

A physical exam requiring firemen to have all natural teeth was unreasonable. *Mahon v. Scearce,* 228 S.W. 2d 384 (1950).

(d) Certification and appointment of eligibles. For certification of eligibles and for appointment and promotion to competitive positions on the basis of such tests, subject to a working test period of probation not to exceed one year. One of the highest three (3) eligibles certified or remaining on the list of eligibles certified to be appointed to each vacancy;

Cases:

A Statutory program for avoiding racial discrimination in employment was not unconstitutional as ap-

> plied to the City of St. Louis. *City of St. Louis v. Missouri Commission on Human Rights,* 517 S.W. 2d 65 (1974).

(e) Filling vacancies; promotions. For filling vacancies in higher competitive positions, so far as practicable, by means of promotion on competitive examination except where vacancies are filled, in the interests of the service, by demotion, transfer, reinstatement, or re-employment, in the order of preference here indicated, where applicable. Promotion on competitive examination shall be deemed to be practicable whenever there are qualified employes in positions of lower classes who are willing to compete;

City Counselor Ops.: 8185

Cases:

> A Statutory program for avoiding racial discrimination in employment was not unconstitutional as applied to the City of St. Louis. *City of St. Louis v. Missouri Commission on Human Rights,* 517 S.W. 2d 65 (1974).

History:

Submission Ordinance No. 55731
Submission Ordinance Approved December 30, 1970.
Amendment Substance: repeal Section 3(e) related to filling vacancies in the Classified Service (Civil Service); enacting a new Section 3(e) to provide for a separate eligibility list for promotion within a department, division or agency where the vacancy exists.
Voter Rejection Date: March 9, 1971.

(f) Tenure of employement. For indefinite tenure of employment in positions in the classified service during meritorious service, except in cases for which definite terms are prescribed by law or charter, and except in cases of temporary appointment

hereunder, but with due provision for layoff on termination of the need for employment in any position, or of funds available therefor;

City Counselor Ops.: 7980, 9771

Cases:

> The specific exemption from indefinite tenure provided in this subsection shows that article VIII § 1 was not repealed by inconsistency. *Riley v. Holland,* 243 S.W. 2d 79, 262 Mo. 682 (1951).

(g) Temporary appointments. For temporary appointments, without competitive tests, to competitive positions, for not to exceed sixty days in any case, which shall not be renewed or extended. Such temporary appointments to be provided for shall include provisional appointments in the absence of available eligibles pending establishment of eligible registers and certification and appointment therefrom, transient appointments for short jobs of work, and emergency appointments pending filling of vacancies by other means than such emergency appointments;

(h) Service standards and ratings. For the establishment of standards of service and a system of service ratings. The service ratings provided shall be given consideration in examinations for promotions, and in connection with increases in pay, layoffs, re-employments, transfers, reinstatements, reductions in pay, demotions, and removals, hereunder. Standards of service shall be established which any employe must meet to qualify for an increase in pay, reinstatement, re-employment, or promotion, and other standards shall be established, failure to meet which shall result in action for decrease in pay, demotion, or removal;

City Counselor Ops.: 7703

(i) Welfare programs. For cooperation by the director with appointing authorities in promoting programs of employe welfare, including such training, health, recreation, economic, and other programs as may be deemed desirable;

(j) Transfers. For transfers between competitive positions of the same grade for which no additional or different tests of fitness are required, in the same or different departments, for the benefit of the service directly, or indirectly for such benefit by promotion of satisfaction of the employes, or by elimination of supernumerary positions;

(k) Reinstatement. For reinstatement to and re-employment in competivie positions after layoff, and after other separation without delinquency or misconduct, where the interests of the service will be served thereby;

(l) Hours of duty, holidays and leaves. For recommendations by the commission to the mayor and aldermen, regaring ordinance provisions to regulate the hours of duty, holidays, and leaves of absence, and for administration of any such ordinances adopted. Such ordinance provisions as are adopted shall be administered and carried into effect by the department of personnel herein provided for. The minimum daily, weekly, and annual service required under regular full-time employment shall be fixed by ordinance with due relation to the requirements in private employment in the city and with a view to equity as between positions of different classes and those under different appointing authorities. The requirements may vary for different classes or conditions of employment but shall be uniform in their application to employes of the same classes under like conditions of work. The ordinance provisions shall be enforced by effective control of attendance and absence and audit of pay rolls with reference thereto. Each employe in the classified service shall be required to engage in the actual work of the office or employment held to such extent as his services may be required for the complete discharge of the duties of such office or employment and a failure so to do shall be ground for removal;

City Counselor Ops.: 7700, 7869

(m) Part-time services. For payment for part-time services on an equitable basis in relation to the hours employed as compared with the requirements for full-time service. Where less than full-time service is required or rendered in any position, compensation for such service shall be paid on the part-time basis established by such rules;

(n) Removals and demotions. For removals, demotions, and decreases in pay in the cases of employes whose service rendered is below satisfactory standards, designed to promote the efficiency of the service. Such action shall be effective only after written notice to, with right of appeal in, the employes affected, and after such investigation as is appropriate to insure that the action taken is on the sole ground of merit and fitness;

City Counselor Ops.: 7997, 9012

(o) Fines and suspensions. For fines, and for suspensions without pay for not to exceed thirty days, and for other disciplinary measures deemed desirable, of less severity than those set forth in the item next preceding;

(p) Resignations. For resignations in good standing, for investigation of reported resignations to determine their good faith, for records of the causes of resignations, and for initiating action to remove causes leading to excessive numbers of resignations of capable employees;

(q) Roster of employes. For maintenance of a complete official roster of employes showing for each employe, his name, address, class title, rate of pay, and changes in any of them, and such other information as may be deemed desirable;

(r) Retirement system. For recommendation if and when permissible under the Constitution and Laws of the state of Missouri, to the mayor and aldermen by the civil service commission of a suitable system for the retirement of employes who, by reason of injury, ill health or age, have become incapacitated for rendering satisfactory service, and for administration by the department of personnel of such retirement system as may be adopted by ordinance;

City Counselor Ops.: 8737

Cases:

> Nothing in this subsection limits the board of aldermen's right to reduce an item of an appropriations ordinance for salaries. *City of St. Louis v. Smith,* 228 S.W. 2d 780, 360 Mo. 406 (1950).

(s) Reports by appointing officers. For reports by appointing officers of new positions and changes in the positions authorized and in the employments therein, and of attendance and absence, which upon approval by the director shall form bases for audit and approval of pay rolls by the comptroller as to compliance with this article and the rules and ordinance thereunder;

Cases:

> Nothing in this subsection limits the board of aldermen's right to reduce an item of an appropriations ordinance for salaries. *City of St. Louis v. Smith,* 228 S.W. 2d 780, 360 Mo. 406 (1950).

(t) Audit of pay rolls. For audit of pay rolls by the comptroller as a condition precedent to payment by the treasurer or any other disbursing officer of any claim or account for personal services. The comptroller shall not approve any item of a pay roll or account for payment of any employe, or issue his warrant for any payment therefor, except on evidence satisfactory to him that the person named has been lawfully employed in a position duly authorized and is entitled to payment for actual service in such position or authorized absences therefrom at the rates, for the periods, and in the amounts, covered by such pay roll or account;

Cases:

> This subsection simply means that the employee's services must be satisfactory to the employer and does not deprive the employee of any rights. *State v. Kirby,* 163 S.W. 2d 990, 349 Mo. 988 (1942).

(u) List of nonessential positions. For the listing of positions deemed nonessential for effective administration of the city's affairs, and for seeing that, as occasion arises, steps be taken toward transfer of the employes therein to any other vacant positions to which they are eligible to be transferred under the provisions of this article, and for prevention of filling of any vacancy occurring therein;

(v) Administration. For the administration and enforcement of the provisions of this article and all provisions of ordinances and rules adopted in pursuance thereof, by the director, subject to the rules of the commission and subject to appeal to and review on appeal by the commission.

Cases:

> The director is empowered to make administrative decisions which do not include decisions contrary to ordinance enacted by the board of aldermen. *Sanders v. City of St. Louis,* 303 S.W. 2d 925 (1957).

(w) Examination fees. Such rules may provide for the charging and collection of reasonable fees from applicants for examinations, as prerequisites to the acceptance of their applications, and in such amounts as are calculated to pay part or all of the cost of preparing and holding the examinations and rating the results thereof.

Section 4 Ordinances to be enacted.

The mayor and aldermen shall provide, by ordinance:

City Counselor Ops.: 8098, 8494, 9248, 10099

Cases:

Nothing in this section limits the board of aldermen's right to reduce an item of an appropriations ordinance for salaries. *City of St. Louis v. Smith,* 228 S.W. 2d 780, 360 Mo. 406 (1950).

(a) Compensation plan. For adoption of a comprehensive plan for the fixing of rates of pay of all employes in the classified service, and amendments thereto, on recommendation of the civil service commission, and for its application and interpretation. Every appropriation and expenditure for personal services in any position in the classified service thereafter shall be made in accordance with the compensation plan so adopted and not otherwise;

City Counselor Ops.: 7869

Cases:

The language "on recommendation" in this subsection is mandatory. *Kirby v. Nolte,* 173 S.W. 2d 391, 351 Mo. 525 (1943).

Upon the commission's recommendation the board of aldermen may enact an ordinance which lowers the rate of pay set by a prior ordinance. *Sanders v. City of St. Louis,* 303 S.W. 2d 925 (1957).

City charter provision that salaries of firemen shall not be less than those of corresponding ranks of police officers whose pay is fixed by the State General Assembly is not invalid as an improper delegation of legislative responsibility. *State ex rel. St. Louis Fire Fighters Association Local No. 73 v. Stemmler,* 479 S.W. 2d 456 (1972).

The "like pay for like work" requirement of the city charter was not violated by difference between compensation paid to members of security force at airport and compensation paid to members of city police force because the state, not the city, had control over the city police force. *Slater v. City of St. Louis,* 548 S.W. 2d 590 (1977).

History:

Submission Ordinance No. 57154
Submission Ordinance Approved March 17, 1976.
Amendment Substance: changing requirements of Article XVIII, Sections 3(b) and 4(a) so as to require inclusion of "excepted" positions such as the Mayor and members of the Board of Aldermen.
Voter Rejection Date: November 2, 1976.

(b) Retirement system. For a contributory retirement system on a sound actuarial basis, if and when permissible under the Constitution and Laws of the State of Missouri, to provide for retirement of employes in the classified service who have become unable to render satisfactory service by reason of physical or mental incapacity;

V.A.M.S.:

70.600 *et seq.* Retirement or pensioning of officers and employees of political subdivisions

(c) Hours of duty and holidays. For regulating hours of duty, holidays, attendance, and absence, in the classified service;

City Counselor Ops.: 7869

Cases:

An ordinance providing for overtime compensation was void because it had not been recommended by the civil service commission. *Abernathy v. City of St. Louis,* 313 S.W. 2d 717 (1958).

(d) Appropriations for department of personnel. For appropriations for the purposes of the department of personnel, adequate to provide for the effective administration and enforcement of the provisions of this article and the rules and ordinances adopted thereunder. In each fiscal year, such appropriations shall aggregate not less than one-half of one percent of the amount of all expenditures for personal services in the city service in the fiscal year next preceding, and in default of such minimum appropriations or any part thereof, such minimum appropriations or any deficiency therein, nevertheless shall be deemed to have been made.

Cases:

> Since there is a minimum appropriation for the department of personnel, the unused portion of that minimum does not revert back. *Kirby v. Nolte,* 164 S.W. 2d 1, 349 Mo. 1015 (1942).

Section 5 Department of personnel.

There is hereby created a department of personnel of the government of the city which shall consist of a director of personnel as head thereof, a civil service commission, and such other employes as may be needed.

City Counselor Ops.: 7778, 8494, 8595, 10252, 10483

Cases:

> This section does not control the classification of the job of director as an office for the purpose of residency requirements. *Kirby v. Nolte,* 164 S.W. 2d 1, 349 Mo. 1015 (1942).

Section 6 Civil service commission.

(a) Qualifications, appointment and term of members. The civil service commission shall consist of three members who, on the dates of their appointment, shall have been citizens of the United and States and residents of the City of St. Louis for at least two years next preceding. They shall be persons whose past records indicate that they favor the merit system of personnel administration. No person shall be eligible to appointment as a member of the civil service commission who holds any other salaried public office or who has held any elective public office or elective position in any political party, or any paid position in any political party, within the four years next prceding the date of his appointment. Members shall be appointed by the mayor without regard to any political consideration. Within thirty (30) days after the adoption of this section, the mayor shall appoint the first civil service commission, designating one member to serve for a term of two (2) years, a second member for a term of four (4) years and the third member for a term of six (6) years from the first day of July, next preceding. All subsequent appointments of members of the commission shall be for six (6) years, except that any vacancy in the membership of the commission occurring at a time other than the expiration of a term shall be filled by the appointment of a member to serve for the unexpired portion of the term.

(b) Removal of members. The mayor may remove a member of the commission only upon charges of nonfeasance, malfeasance, or misfeasance in office and after a public hearing to be held not less than ten days after notice to the member so charged, accompanied by a statement in writing of the specific acts charged. At the hearing, the member may be represented by an attorney and shall be entitled to present witnesses in his defense.

(c) Compensation. Each member of the commission shall be paid fifteen ($15) dollars for each day on which he has actually attended a meeting of the commission officially held, as a member thereof, but in no case shall any member be paid more than sixteen hundred eighty dollars ($1680) in any one fiscal year.

City Counselor Ops.: 8494, 9248, 9661, 10252

McQuillin:

12.55—12.56a Civil Service Commission

Section 7 Commission powers and duties.

The commission shall have power, and it shall be its duty:

City Counselor Ops.: 8301, 8494, 8900, 9661, 9771, 10483

Cases:

> The commission has the power to promulgate a rule providing for the dismissal of an employee. *Fleming v. Holland,* 260 S.W. 2d 840 (1953).
>
> An ordinance providing for overtime compensation was void because it had not been recommended by the civil service commission. *Abernathy v. City of St. Louis,* 313 S.W. 2d 717 (1958).

(a) Administration. To prescribe, and to amend from time to time as such action is deemed to be desirable, rules for the administration and enforcement of the provisions of this article, and of any ordinance adopted in pursuance thereof, and not inconsistent therewith;

City Counselor Ops.: 7703, 9531

(b) Ordinances. To recommend to the mayor and aldermen in accordance with this article, ordinances to provide for:

(1) a compensation plan providing properly related scales of pay for all grades of positions, and rules for its interpretation and application;

(2) a plan for a system for retirement of superannuated and otherwise incapacitated employes, if and when permissible under the Constitution and Laws of the State of Missouri;

(3) regulation of hours of duty, holidays, attendance and absence;

(4) such other matters within the scope of this article as require action by the mayor and aldermen;

(5) such changes in any such matters from time to time as may be deemed to be warranted;

City Counselor Ops.: 7700, 7869, 8098

(c) Investigations. To make such inquiries and investigations as it may deem to be warranted regarding the administration and effect of the provisions of this article and of ordinances and rules adopted in accordance therewith, and to make such recommendations to the director and to the mayor and aldermen as in its judgment may be warranted in the premises;

City Counselor Ops.: 9531

(d) Decisions. To consider and determine any matter involved in the administration and enforcement of this article and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the director, or on appeal by any appointing authority, employe, or taxpayer of the city, from any act of the director or of any appointing authority. The decision of the commission in all such matters shall be final, subject, however, to any right of action under any law of the state or of the United States;

City Counselor Ops.: 7691, 8101, 9531, 9544

Cases:

> This section provides for an administrative remedy which must be exhausted before resorting to courts. *State v. Scearce,* 303 S.W. 2d 175 (1957): *Feldman v. City of St. Louis,* 338 S.W. 2d 345 (1960).
>
> No right of appeal from the commission is accorded the director of personnel. *Scearce v. Simmons,* 294 S.W. 2d 673 (1954).

(e) Director. To hold an examination for the position of director, whenever eligibles therefor are needed, and to certify eligibles resulting therefrom to the mayor, and also to perform all such duties with reference to that position as are assigned to the director as to all other positions in the classified service; and

(f) Reports. To transmit to the mayor and aldermen, with such additions and comments as it may desire to make, such annual and special reports as the director of personnel may submit for its action;

(g) Reinstatement of employes. To order the reinstatement without loss of pay of any employe who has been discharged, demoted, or reduced in rank or compensation for religious, racial or political reasons.

(h) Limitations. Except as provided in this section, the commission shall have no administrative powers or duties. Except as so provided, it shall have no power to direct or control any employe of the department of personnel or other employe of the city, or the action to be taken by any of them in any matter or case. Neither the commission nor any of its members shall have power to take any action except by majority vote in meeting asembled.

City Counselor Ops.: 9531

Section 8 Director of personnel— Appointment; qualifications; compensation.

The director of personnel shall be appointed by the mayor from a certification of eligibles made by the civil service commission from an eligible list established by means of competitive tests of fitness conducted by the civil service commission, within thirty (30) days after such certification. One of the three eligibles standing highest on such certification who have indicated their willingness to accept appointment shall be appointed by the mayor. The commission shall secure such information and assistance as may be practicable in formulating the fitness tests for director and rating the results, from persons experienced in public personnel administration. Any person to become eligible for appointment as director shall have had not less than five (5) years' experience in personnel administration, of which not less than two years shall have been in public personnel administration, and shall be conversant with the principles and techniques of modern public personnel administration; he need not be at the time of examination or appointment, a resident of the City of St. Louis. All action under this section shall be subject to the other provisions of this article and the rules adopted in pursuance thereof, so far as consistent with this section. The commission shall fix the intitial salary of the director at not less than six thousand ($6,000) dollars a year to be in effect until a compensation plan is adopted hereunder. Thereafter the salary of the director shall conform to such compensation plan.

City Counselor Ops.: 8494

Cases:

> Although the director need not be a resident of the city he must be a Missouri resident. *Kirby v. Nolte,* 164 S.W. 2d 1, 349 Mo. 1015 (1942).

Section 9 Director's powers and duties generally; removal from office.

The director shall be the head of the department of personnel, responsible for the conduct of all of its affairs except as to such powers and duties as are vested in the commission by this article. He shall have power and it shall be his duty, in person or through the department of personnel:

City Counselor Ops.: 8494, 9771

Cases:

> The director is empowered to make administrative decisions which do not include decisions contrary to

ordinances enacted by the board of aldermen. *Sanders v. City of St. Louis,* 303 S.W. 2d 925 (1957).

A standard set by the director that firemen have natural teeth may be held unreasonable by the court. *Mahon v. Scearce,* 228 S.W. 2d 384 (1950).

(a) Secretary of commission. To serve as secretary of the commission, to see to the keeping of the minutes and records thereof, to conduct investigations and prepare reports for the commission in matters under its consideration, and in all other proper ways to facilitate the actions and proceedings of the commission;

City Counselor Ops.: 9531

(b) Appointment of employees; administration. To appoint all employes of the department of personnel except the director and the members of the commission, and to direct and control their work and, under customary financial procedures of the city, the expenditures from appropriations for the department;

City Counselor Ops.: 9548

(c) Roster of employes. To establish an maintain a roster of all city employees showing the salient facts of the employment history of each employee;

(d) Preparation of rules. To prepare and recommend, for action by the commission, rules, including a classification plan and a service rating plan, drafts of ordinances for recommendation to the mayor and aldermen in matters requiring such ordinances, including a compensation plan, and changes as deemed desirable from time to time in such rules and ordinances;

City Counselor Ops.: 9544

(e) Classification of positions. To allocate each position in the classified service to its appropriate class in the classification plan adopted under the provisions of this article, and reallocate positions as conditions warrant, from class to class;

City Counselor Ops.: 9544

(f) Definitions of classes and grades. To prepare and maintain appropriate definitions of classes and grades in the classification plan and amend them from time to time as he may deem such action warranted;

City Counselor Ops.: 9544

Eligible lists. To hold examinations, pass upon the qualifications of applicants, and establish eligible lists, as needed, and to certify names of eligibles to appointing authorities for filling vacancies in competitive positions;

Cases:

It was beyond the director's authority to require firemen to have natural teeth. *Mahon v. Scearce,* 228 S.W. 2d 384 (1950).

(h) Employe programs. To cooperate with appointing officers and others in providing programs of training for employes, for employe welfare, for promoting of employe morale, and for otherwise raising of standards of performance in the service in every practicable way;

(i) Employment transaction. To pass upon, for compliance with the provisions of the charter and ordinances and these rules, and approve or disapprove as to compliance therewith, all appointments, demotions, transfers, promotions, service ratings, leaves of absence, changes in rates of pay, suspensions, spearations, and other employment transactions affecting the status of employes;

City Counselor Ops.: 9531

(j) Investigations. To make such investigations as he may deem desirable with respect to the enforcement and effect of the personnel provisions of the charter and ordinances and of the rules, and such special investigations as the commission or the mayor may request and make special reports relative thereto;

City Counselor Ops.: 8877, 9531

(k) Compensation plan. To devise and recommend to the commission a compensation plan consisting of scales of pay for the several grades or classes in due relation to each other and to rates prevailing for like employment in private industry, rules for the interpretation and application of the plan, and changes in such plan and rules from time to time as deemed desirable;

Cases:

> City charter provision limiting salaries of city employees and officials to $25,000 did not violate the equal protection clause of the Fourteenth Amendment. *Bruce v. Scearce*, 390 F. Supp. 297 (1975).

(l) Administrative regulations. To make such administrative regulations as he may deem necessary, not inconsistent with the charter, ordinances applicable, and these rules, relative to matters involved in the administration of the personnel provisions of such charter, ordinances, and rules;

(m) Reports. To make annual reports to the commission for its approval and transmission to the mayor and aldermen on the work of the department and the administration and effect of this article, with such recommendations for action as he may deem desirable, and such special reports as may be requested by the commission or the mayor. Such reports shall be public records;

(n) Nonessential positions. To aid the mayor and aldermen, and the several appointing officers, in determining the numbers and kinds of positions needed to carry on the city's business and in discovering and labeling unnecessary positions in order that they may be designated as supernumerary, so that they may be eliminated as opportunity affords for transfer of the employes to other positions, under the provisions of this article, and so that, as they become vacant, steps may be taken to keep them from being filled;

(o) Assistance to appointing authorities. To aid the mayor and aldermen, and appointing authorities in all practicable ways in handling other personnel matters relating to positions under their jurisdictions; and

(p) Additional powers and duties. To do all other and further things necessary or proper for making effective the provisions of this article and all rules and ordinances adopted in pursuance thereof, and not inconsistent therewith, whether of the same kinds as those specified in this section, or of different kinds. The power of the director to make effective the provisions of this article and of ordinances shall not be deemed to be contingent on the adoption of rules but, in the absence of rules that are applicable, he shall have power to take such action, not inconsistent with this article or with ordinances pursuant thereto, as may be reasonably necessary and proper to effectuate the purposes thereof.

(q) The personnel director may be removed from office only upon charges of nonfeasance, malfeasance, or misfeasance in office and after a public hearing to be held not less than ten days after notice to the director accompanied by a statement in writing of the specific acts charged. The personnel director may be represented by an attorney and shall be entitled to present witnesses in his defense. The public hearing shall be conducted by the civil service commission. At the conclusion of the hearing, the commission shall recommend to the mayor whether or not the personnel director shall be removed from office. The mayor shall have the power to accept or reject the recommendation of the civil service commission and his decision shall be final.

City Counselor Ops.: 8877

Section 10 Selection of examiners and assistants; qualifications of employes.

The director of personnel may select suitable persons in the service of the city, with the consent of the appointing authorities, under whom such persons serve, to act as examiners under his direction or otherwise to assist in the administration of this article and the rules and ordinances adopted thereunder. It shall be deemed part of the official duties of all employes so selected, to render such services without extra compensation therefor and in addition to other qualifications required by this charter, all officers and employes, except day laborers, and except in such cases requiring scientific, mechanical, professional, or educational qualifications as may be determined by the civil service commission, must have resided in the city for at least one year and failing or ceasing so to reside, shall forfeit their office or employment.

City Counselor Ops.: 8014, 8185, 8234, 8368, 8602, 9059, 10080, 10345, 10452, 10477, 10510

Section 11 Offices and facilities to be provided; unauthorized compensation.

It shall be the duty of all employes of the city to allow the reasonable use of public buildings, and to heat and light them as conditions may require, for holding examinations, and in all other proper ways to facilitate the holding of such examinations. All employes of the city shall grant the director of personnel and any agent authorized by him free access to the premises, and the records relating to employes, under their control, during the usual business hours, and shall furnish them such facilities, assistance, and information as may be required in carrying into effect the provisions of this article and the rules and ordinances adopted thereunder. After notice to the comptroller by the director that any person is employed or is proposed to be paid as an employe in the classified service in any amount not provided for under the provisions of this article and any rules and ordinances in effect not inconsistent therewith, the comptroller shall be charged with notice thereof and shall not approve any further payment to such person except in accordance with such provisions.

City Counselor Ops.: 8617

Section 12 Status of persons employed by city when article takes effect.

Every person who, when this article takes effect, is legally occupying, by regular appointment thereto, a position placed by this article in the classified service, shall be entitled to continue to occupy such position, without further examination for such employment, and shall become subject to the provisions of this article, including the provisions relating to service rating, with the same effect as though he had been appointed to the position occupied, under the provisions of this article. The provisions of this section also shall apply to all persons who, on the date of acquisition of any public utility hereafter acquired by the city, are regularly employed by such utility.

Cases:

An employee who was transferred to a higher position temporarily was legally employed and therefore a permanent employee. *Feuchter v. City of St. Louis,* 210 S.W. 2d 21, 357 Mo. 616 (1948).

Persons appointed after this article took effect were not exempt from further examination. *Bokern v. Scearce,* 174 S.W. 2d 355, 237 Mo. App. 526 (1943).

Section 13 Liability of officers and sureties for payment of unauthorized compensation.

No claim of any person appointed or employed contrary to the provisions of this article or the rules and ordinances thereunder, whose payroll or account is refused approval or payment, shall be paid by the city, but the officer or officers appointing or employing, or attempting to appoint or employ any such person, and the sureties on his or their official bonds, shall be liable jointly and severally for the amount due to such person by reason of such employment or purported employment. No officer, during the time of his official service or thereafter, or his surety, or other person on behalf of either, shall be reimbursed by the city for any sum so paid or recovered. The city counselor, or special counsel designated therefor by the board of aldermen, shall prosecute such actions as may be necessary to recover any sums paid contrary to the provisions of this article from any officer or officers making the appointment or continuing the employment on which such payment was based, in contravention of the provisions of this articl or of the rules and ordinances made in pursuance thereof, or any officer signing or countersigning or authorizing the signing or countersigning of any order or warrant for payment, or making any payment, therefor, or from the sureties of any such officer or officers on their official bonds.

City Counselor Ops.: 8080, 9727

Cases:

> This section is penal in nature and must be strictly construed. *State v. Kirby,* 163 S.W. 2d 990, 349 Mo. 988 (1942).
>
> This section is construed as referring only to intentional or negligent wrongful appointment an employee. *State v. Kirby,* 163 S.W. 2d 990, 349 Mo. 988 (1942).

Section 14 Examinations for licenses.

The department of personnel, by agreement with any other department or other agency of the city government, may conduct examinations to determine the qualifications of applicants

for licenses issued by such department or other agency, and certify the results thereof, subject to reimbursement of the reasonable costs of such service by transfer from the appropriations of the agency served to those of the department of personnel.

City Counselor Ops.: 8368

Cases:

> The function of giving examinations required by ordinance as a condition for receiving a license may be delegated to the department of personnel. *State v. Kirby,* 163 S.W. 2d 990, 349 Mo. 988 (1942).

Section 15 Unlawful conduct relating to examinations.

No person shall willfully, by himself or in cooperation with any other, defeat, deceive or obstruct any person in respect to his rights in relation to any tests of fitness or appointment to any position under the provisions of this article, and any rules or ordinances made thereunder, or shall willfully and falsely mark, grade, estimate or report upon the tests of fitness or proper standing of any person tested or certified pursuant to the provisions of this article or the service ratings of any employe, or aid in so doing, or shall willfully make any false representation concerning the same, or concerning any person tested, or shall willfully furnish to any person any special or secret information for the purpose of either improving or injuring the prospect or chances of any person in connection with any test or appointment, or shall impersonate any other person or permit or aid in any manner any other person to impersonate him, in connection with any test or appointment, or application or request to be examined.

Section 16 Racial, political and religious discrimination forbidden.

No recommendation or question under the authority of this article shall relate to the race, political or religious opinions, affiliations or service, of any person. No person shall be appointed to a position in the classified service hereunder, nor be demoted, re-employed, promoted, removed, increased or reduced in compensation, nor in any other way be favored or discriminated against in any matter within the purview of this article, because of his race, political or religious opinions, affiliations or service.

Cases:

The limitations in this subsection do not prevent the application of a state-established nondiscrimination policy. *City of St. Louis v. Missouri Commission on Human Rights*, 517 S.W. 2d 65 (1974).

History:

Submission Ordinance No. 43458
Submission Ordinance Approved April 8, 1946
Amendment Substance: by repealing Section 16, and enacting a new section simplifying language prohibiting political considerations and activities, and broadening section to include prohibitions against discriminations in the classified service based on race, political or religious opinions, affiliations or service.
Voter Adoption Date: August 6, 1946.

Section 17 Political assessments and contributions.

No person in the classified service shall be under any obligation to contribute to any political fund or to render any political service, and no such person shall do so or be removed or otherwise prejudiced for refusing to do so. No person in the city service shall discharge or promote or reduce, or in any manner change the official rank or compensation of any other person in such service, or promise or threaten so to do, for withholding or refusing to make any contribution of money or service or any other valuable thing for any political purpose, or in any other manner, directly or indirectly, use his official authority or influence to compel or induce any other person to pay or render any political assessment, subscription, contribution, or service. Every such person who may have charge or control of any building, office or room occupied for any purpose of the government of the city, is hereby authorized to prohibit the entry of any person, and he shall not knowingly permit the entry of any person, for the purpose of therein making, collecting, receiving, or giving notice of, any political assessment, subscription or contribution; and no person shall enter or remain in any such office, building, or room, or send or direct any letter or other writing thereto, for the purpose of giving notice of, demanding, or collecting a political assessment, subscription, or contribution, nor shall any person therein give notice of, demand, collect, or receive any such assessment, subscription, or contribution; no person shall prepare or make out, or take any part in preparing or making out, any political assessment, subscription, or contribution with the intent that it shall be sent or presented to or collected from any employe in the classified service, and no person shall knowingly send or present any political assessment, subscription, or contribution to, or request its payment of, any such employe.

City Counselor Ops.: 8236, 8426

Cases:

The application of the restrictions in this section to classified employees only does not violate the equal protection clause since it serves the legitimate goal of increasing efficiency in public service. *State v. Kirby*, 163 S.W. 2d 990, 349 Mo. 988 (1942).

Section 18 Promises of official influence to affect political action.

No person, while holding any city office, or while in nomination or seeking nomination to appointment to any such office, shall corruptly use or promise to use, directly or indirectly, any official authority of influence, possessed or anticipated, to confer upon any person, or to secure or aid any person in securing, any office or public employment, or any nomination, confirmation, promotion, or increase of salary, upon the consideration or condition that the vote or political influence or action of any person shall be given or used in behalf of any candidate, officer, or party, or upon any other corrupt condition or consideration. No person, being an officer of the city, or having or claiming any such authority or influence, in relation to the nomination, employment, confirmation, promotion, removal or increase or decrease of salary, of any employe, shall corruptly use, or promise or threaten to use, any such authority or influence, directly or indirectly, to coerce or persuade the vote or political action of any person, or the removal, discharge, or promotion of any employe of the city.

City Counselor Ops.: 8426, 10095

Section 19 Political activity of classified employes.

No person holding a position in the classified service shall use his official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take an active part in a political campaign, or shall seek or accept nomination, election, or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color, or indicia favoring or opposing a candidate for election or nomination to a public office, whether federal, state, county, or municipal. But nothing in this section shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attendance upon political meetings, from enjoying entire freedom from all interference in casting his vote, from expressing privately his opinions on all political questions, or from seeking or accepting election or appointment to public office, provided, however, that no active campaign for election shall be conducted by any employe unless he shall first resign from his position.

City Counselor Ops.: 8118, 8426, 8876, 9376, 9825, 10384

Cases:

> The application of the restrictions in this section to classified employes only does not violate the equal protection clause since it serves the legitimate goal of increasing efficiency in public service. *State v. Kirby,* 163 S.W. 2d 990, 349 Mo. 988 (1942).

Section 20 Leave to be granted for purpose of voting.

On any election day which is not a state or national holiday, the offices of the city shall remain open for business. All employes shall be entitled to vote and whenever necessary may be granted not more than four hours' leave with pay for the purpose of voting.

Cases:

> For this section to conform with state statutes the words "not more than" have no effect. *State v. Kirby,* 163 S.W. 2d 990, 349 Mo. 988 (1942).

Section 21 False statements under oath.

No person knowingly and willfully shall make under oath any false statement in any application or other statement filed with, or in any proceeding before, the director of personnel, or the civil service commission, or in any investigation conducted by the director or the commission.

Section 22 Penalties for violation.

Any person who shall willfully or through culpable negligence violate or conspire to violate any provision of this article or of any ordinance made pursuant theretofor which no other punishment is provided herein, shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars or by imprisonment for not to exceed six months, or both, in the discretion of the court. The conviction of any employee of any such offense shall operate automatically to terminate his service and to vacate his position. Any employee so removed from the service shall not be reinstated, reemployed or reappointed, or in any other manner re-enter the service of the City of St. Louis for a period of five years from the date of such conviction, and the comptroller and any other fiscal officers responsible for payment of any compensation to such person are hereby charged with notice thereof. Nothing in this section shall be construed to supplant or in any way affect any prosecution that may be elected to be initiated under any other provision of law relating to the nonfeasance, malfeasance, or misfeasance of public officers.

Cases:

> An employee need not be convicted under this section to be validly dismissed. *Fleming v. Holland,* 260 S.W. 2d 840 (1943).

Section 23 Compliance with article and civil service rules.

It shall be the duty of all employes to conform to and comply with, and to aid in all proper ways in carrying into effect, the provisions of this article, and the rules and ordinances prescribed thereunder. Whenever the director of personnel shall make any order under the provisions of this article or in accordance with any rules or ordinance thereunder, the employe to whom such order is directed shall forthwith comply with the terms and provisions thereof, and any failure or neglect on the part of such employe properly to satisfy or meet the requirements of such order without sufficient justification therefor, shall be construed as grounds for his removal, subject to all rights of appeal and review provided by this article or by ordinance or law.

City Counselor Ops.: 8617

Section 24 Legal remedies for payment of unauthorized compensation.

The city counselor, or special counselor designated therefor by the board of aldermen, on complaint of any officer or employe of the city or of any taxpayer, shall prosecute, and of his own motion may prosecute, such action as may be appropriate to restrain the payment of salary or other compensation to any person appointed to or holding any position in violation of any of the provisions of this article or the rules and ordinances thereunder, or to recover any payment so made, and such right shall not be limited or denied by reason of the fact that such position shall have been classified as, or determined to be, not subject to competitive tests. All money recovered in any action brought under the provisions of this section shall, when collected, be paid into the treasury of the city.

Section 25 Investigatory powers of director; payment of witnesses.

In the course of any hearing, investigation, or tests of fitness conducted under the provisions of this article, the director of personnel and any other person authorized by him as his representative for such purposes, shall have power to administer oaths, to subpoena and require the attendance of witnesses within the city and the production by them of books and papers pertinent to any matter of inquiry and to examine such witnesses under oath, in relation to any matter properly involved in such proceeding. For such purposes, the director or his authorized representative may invoke the power of any court of record in the city, or judge thereof, in term time or vacation, to compel the attendance and testifying of witnesses and the production of books and papers in compliance with such subpoenas. All witnesses so subpoenaed, who are not employes of the city, shall be entitled to the same fees as are allowed in civil cases in courts of record, which shall be paid upon vouchers approved by the director of personnel from the appropriations of the department of personnel on the audit and warrant of the comptroller.

City Counselor Ops.: 9531

Section 26 Effect of established titles and rates of pay.

The titles and rates of pay of any positions in the classified service, as set forth in any ordinance or appropriation now or hereafter in effect, shall be deemed to be permissive only, authorizing positions that might properly be designated by such titles and compensated at such rates if so constituted that such titles and rates would apply under the provisions of this article, but not as mandatory in requiring that such titles shall be used to designate such position to the exclusion of all others or that payments shall be made at such rates, irrespective of the true nature of the positions existing by virtue of such authority and of whether such titles and rates are appropriate to the positions as actually constituted.

Section 27 Partial invalidity of provisions.

If any part of this amendment is held by competent authority to be invalid, every other part thereof not so held, shall continue in full force and effect as though such invalid part had not been included therein.

Section 28 Repeal of inconsistent provisions.

All provisions of the city charter and ordinances and rules thereunder, or parts thereof, inconsistent with this amendment, are hereby repealed.

Cases:

> When there has been no repeal in specific terms, a former provision will not be repealed unless the two are irreconcilable. *Simmons v. City of St. Louis,* 264 S.W.2d 928 (1954).

Section 29 Powers and duties of efficiency board vested in personnel board.

All powers and duties delegated to the efficiency board by this charter which are not specifically repealed by this amendment are preserved in full force and effect to the personnel department.

Section 30 Effective date.

This amendment shall take effect immediately, except that payrolls may be certified and payments be made thereon, under the provisions of previously existing charter provisions, and ordinances and rules, applicable thereto, during such temporary period not to exceed one year as is necessary, in the opinion of the civil service commission, to provide for the director of personnel, the rules, the classification and compensation plans, the ordinances, the allocation of the existing positions to their appropriate classes and the fixing of the rates of compensation thereunder, and the forms and procedures, necessary for full compliance with the provisions of this article.

Cases:

> A charter amendment can provide that it shall be effective when adopted. *State v. Kirby,* 163 S.W. 2d 990, 349 Mo. 988 (1942).
>
> As far as the right to appeal to the commission is concerned, the amendment became effective when adopted. *State v. Hertenstein,* 163 S.W. 2d 963, 349 Mo. 1010 (1942).

Section 31 Fire department.

(a) Notwithstanding any other provisions of this charter or ordinances of the City of St. Louis to the contrary or in conflict herewith, the following designated ranks and positions of members and employes of the fire department of the City of St. Louis shall for the purposes of compensating said members and employes of said fire department by salaries for their duties be equivalent to and correspond with the ranks and positions of officers of the police force of the City of St. Louis hereinafter set forth beside each respectively, and the salaries of said designated ranks and positions of members of the fire department of the City of St. Louis shall from and after the effective date of this section and thereafter not be less than the salaries provided by law for the said equivalent and corresponding ranks and positions of officers of the police force of the City of St. Louis, set forth beside each respectively:

Fire Department Rank or Position — **Police Force Rank or Position**

Fire Chief — Chief of Police

Deputy Fire Chief — Lieutenant Colonel, other than Assistant Chief of Police

Battalion Fire Chief — Major

Fire Captain — Lieutenant

Fire Equipment Dispatcher III — Lieutenant

Fire Fighter, Fire Equipment Dispatcher I and II and Fire Prevention Inspector who has served more than twenty years in the Fire Department — Patrolman who has served more than twenty years as a patrolman

Fire Fighter, Fire Equipment Dispatcher I and II and Fire Prevention Inspector who has served more than fifteen years in the Fire Department — Patrolman who has served more than fifteen years as a patrolman

Fire Fighter, Fire Equipment Dispatcher I and II and Fire Prevention Inspector who has served more than ten years in the Fire Department — Patrolman who has served more than ten years as a patrolman

Fire Fighter, Fire Equipment Dispatcher I and II and Fire Prevention Inspector who has served more than five years in the Fire Department — Patrolman who has served more than five years as a patrolman

Fire Fighter, Fire Equipment Dispatcher I and II and Fire Prevention Inspector who has served more than four years in the Fire Department — Patrolman who has served more than four years as a patrolman

Fire Fighter, Fire Equipment Dispatcher I and II and Fire Prevention Inspector who has served more than three years in the Fire Department — Patrolman who has served more than three years as a patrolman

Fire Fighter, Fire Equipment Dispatcher I and II and Fire Prevention Inspector who has served more than two years in the Fire Department — Patrolman who has served more than two years as a patrolman

Fire Fighter, Fire Equipment Dispatcher I and II and Fire Prevention Inspector who has served more than one year in the Fire Department — Patrolman who has served more than one year as a patrolman

Fire Fighter, Fire Equipment Dispatcher I and II and Fire Prevention Inspector who is serving in his first year in the Fire Department — Patrolman who is beginning his first year as a patrolman

(b) All provisions of the city charter and ordinances and rules thereunder or parts thereof, inconsistent with this amendment are hereby repealed.

City Counselor Ops.: 10346

Cases:

This section is not invalid as an improper delegation of legislative responsibility and does not violate any constitutional requirement relative to separation of powers. *State ex rel. St. Louis Fire Fighters Association Local No. 73 v. Stemmler,* 479 S.W. 2d 456 (1972).

This section, insofar as it prescribes minimum compensation, is self-enforcing. *State ex rel. St. Louis Fire Fighters Association Local No. 73 v. Stemmler,* 479 S.W. 2d 456 (1972).

A proposed amendment to a city charter pursuant to an initiative petition requiring salaries of the city fire department to be not less than salaries received by members of another city's fire department was unconstitutional. *State ex rel. Card v. Kaufman,* 517 S.W. 2d 78 (1974).

Firemen's salaries may be above the maximum set by article VIII of this charter. *Bruce v. Scearce,* 390 F. Supp. 297 (1975).

History:

Submission Ordinance No. 55656
Submission Ordinance passed over veto June 26, 1970.
Amendment Substance: amendment of Article XVIII, as amended, by enacting a new Section 31, establishing parity of compensation of City Fire Department salaries with those of the police force of the City; and detailing equivalent ranks of the two services.
Voter Adoption Date: September 15, 1970.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

RULE II

Section 4. AMENDMENT OF RULES:

Amendments to the rules may be made by the Commission from time to time, as circumstances and conditions may require and may be made in accordance with the procedure outlined in Rule II, Section 3.

Section 5. ADMINISTRATIVE REGULATIONS:

The Director shall promulgate and, as occasion requires, rescind or amend administrative regulations which shall prescribe the detailed procedures to be followed in carrying out the provisions of Article XVIII and of these rules.

Section 6. POWERS AND DUTIES OF THE COMMISSION:

The Commission shall have the power and it shall be its duty:

(a) to prescribe, and to amend from time to time as such action is deemed to be desirable, rules for the administration and enforcement of the provisions of Article XVIII and of any ordinance adopted in pursuance thereof, and not inconsistent therewith;

(b) to recommend to the Mayor and Aldermen, in accordance with Article XVIII, ordinances to provide for:

1. a compensation plan providing properly related scales to pay for all grades of positions, and rules for its interpretation and application;
2. a plan for a system for retirement of superannuated and otherwise incapacitated employees, if and when permissible under the constitution and laws of the State of Missouri;

3. regulation of hours of duty, holidays, attendance and absence;

4. such other matters within the scope of this article as require action by the Mayor and Aldermen;

5. such changes in any such matters from time to time as may be deemed to be warranted.

(c) to make such inquiries and investigations as it may deem to be warranted regarding the administration and effect of the provisions of this article and of ordinances and rules adopted in accordance therewith, and to make such recommendations to the Director and to the Mayor and Aldermen as in its judgment may be warranted in the premises;

(d) to consider and determine any matter involved in the administration and enforcement of Article XVIII and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the Director, or on appeal by any appointing authority, employee, or taxpayer of the City, from any act of the Director or of any appointing authority. The decision of the Commission in all such matters shall be final, subject, however, to any right of action under any law of the State or of the United States;

(e) to hold an examination for the positin of Director, whenever eligibles therefor are needed, and to certify eligibles resulting therefrom to the Mayor, and also to perform all such duties with reference to that position as are assigned to the Director as to all other positions in the classified service;

(f) to transmit to the Mayor and Aldermen, with such additions and comments as it may desire to make, such annual and special reports as the Director of Personnel may submit for its action;

(g) to order the reinstatement without loss of pay of any employee who has been discharged, demoted, or reduced in rank or compensation for religious, racial, or political reasons;

(h) to represent the public interest in the improvement of personnel administration in the City Service;

(i) to advise the Mayor and the Director on problems concerning personnel administration;

(j) to advise and assist the Director in fostering the interest of institutions of learning, civic, professional, and employee organizations in the improvement of personnel standards in the City Service.

Section 7. DUTIES AND POWERS OF THE DIRECTOR:

The Director shall have the power and it shall be his duty:

(a) as executive head of the Department, to direct and supervise all its administrative and technical activities;

(b) to serve as secretary of the Commission, to see to the keeping of the minutes and records thereof, and in all other proper ways to facilitate the actions and proceedings of the Commission;

(c) to appoint all employees of the Department of Personnel except the Director and the members of the Commission, and to direct and control their work;

(d) to direct and control, under the customary financial procedures of the City, the expenditures from appropriations for the Department;

(e) to establish and maintain a roster of all City emplyees showing as to each employee the class title of the position held, the salary or pay, any change in class title, pay or status, and any other necessary data;

(f) to prepare and recommend for action by the Commission rules, including a classification plan and a sercice rating plan, drafts of ordinances for recommendation to the Mayor and Aldermen in matters requiring such ordinances, and changes as deemed desirable from time to time in such rules and ordinances, including a compensation plan;

(g) to allocate each position in the classified service to its appropriate class in the classification plan adopted under the provisions of Article XVIII, and reallocate positions as conditions warrant, from class to class;

(h) to prepare and maintain appropriate definitions of classes and grades in the classification plan and amend them from time to time as he may deem such action warranted;

(i) to hold examinations, pass upon the qualifications of applicants, and establish eligible lists as needed, and to certify names of eligibles to appointing authorities for filling vacancies in competitive positions;

(j) to cooperate with appointing officers and others in providing programs of training for employees, for employee welfare, for promoting of employee morale, and for otherwise raising of standards of performance in the service in every practicable way;

(k) to pass upon, for compliance with the provisions of the Charter and ordinances and these rules, and approve or disapprove as to compliance therewith, all appointments, demotions, transfers, promotions, service ratings, leaves of absence, changes in rates of pay, suspensions, separations, and other employment transactions affecting the status of employees;

(l) to make such investigations as he may deem desirable with respect to the enforcement and effect of the personnel provisions of the Charter and ordinances and of these rules, and such special investigations as the Commission or the Mayor may request and make special reports relative thereto;

(m) to devise and recommend to the Commission a compensation plan consisting of scales of pay for the several grades or classes in due relation to each other and to rates prevailing for like employment in private industry, rules for the interpretation and application of the plan, and changes in such plan and rules from time to time as deemed desirable, including a draft of an ordinance for recommendation to the Mayor and Board of Aldermen;

(n) to make such administrative regulations as he may deem necessary, not inconsistent with the Charter, ordinances applicable, and these rules, relative to matter involved in the administration of the personnel provisions of such Charter, ordinances, and rules;

(o) to make annual reports to the Commission for its approval and transmission to the Mayor and Aldermen on the work of the Department and the administration and effect of Article XVIII, with such recommendations for action as he may deem desirable, and such special reports as may be requested by the Commission or the Mayor;

(p) to aid the Mayor and Aldermen, and the several appointing officers, in determining the number and kinds of positions needed to carry on the City's business and in discovering and labeling unnecessary positions in order that they may be designated as supernumerary, so that they may be eliminated as opportunity affords for transfer of the employees to other positions, under the provisions of Article XVIII, and so that, as they become vacant, steps may be taken to keep them from being filled;

(q) to aid the Mayor and Aldermen, and appointing authorities in all practicable ways in handling other personnel matters relating to positions under their jurisdiction.

(r) to do all other and further things necessary or proper for making effective the provisions of Article XVIII and all rules and ordinances adopted in pursuance thereof, and not inconsistent therewith, whether of the same kinds as those specified in this section, or of different kinds;

(s) to take such action, not inconsistent with Article XVIII or ordinances pursuant thereto, as may be reasonably necessary and proper to effectuate the purpose of such article and ordinances, in the absence of specific provisions in Article XVIII, ordinances, or rules of the Commission;

(t) to designate an employee of the Department to act as his deputy, upon whom the powers and duties of the Director shall devolve in the absence of the Director or his inability from any cause to discharge the powers and duties of his office;

(u) to retain, for purposes of assisting in the examination of candidates for positions of high responsibility and positions requiring unusual qualities or qualifications, the services of persons *without regard to their residence,* who because of their experience or for other reasons have special acquaintance with the qualities or qualifications requisite for the positions under examination;

(v) to administer and enforce the provisions of Article XVIII, of all ordinances adopted pursuant thereto, and of these rules, subject to these rules and to appeal and review by the Commission.

Section 8. COMPLIANCE WITH LAW, RULES, AND ORDERS:

It shall be the duty of all employees to conform to and comply with, and to aid in all proper ways in carrying into effect, the

provisions of Article XVIII and the rules and ordinances prescribed thereunder. Whenever the Director of Personnel shall make any order under the provisions of Article XVIII or in accordance with any rules or ordinances thereunder, the employee to whom such order is directed shall forthwith comply with the terms and provisions thereof, and any failure or neglect on the part of such employee properly to satisfy or meet the requirements of such order without sufficient justification therefor, shall be construed as grounds for his removal, subject to all rights of appeal and review provided by this Article or by ordinance or law.

Section 9. VIOLATION AND PENALTIES:

Any person who shall willfully or through culpable negligence violate or conspire to violate any provision of Article XVIII or of any ordinance made pursuant thereto for which no other punishment is provided therein, *shall be guilty of a misdemeanor,* and upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars or *by imprisonment for not to exceed six months, or both,* in the discretion of the court. The conviction of any employee of any such offense shall operate automatically to terminate his service and to vacate his position; any employee so removed from the service shall not be reinstated, reemployed, or reappointed, or in any other manner reenter the service of the City of St. Louis for a period of five years from the date of such conviction, and the Comptroller and any other fiscal officers responsibe for payment of any compensation to such person are hereby charged with notice thereof. Nothing in this section shall be construed to supplant or in any way affect any prosecution that may be elected to be initiated under any other provision of iaw relating to the nonfeasance, malfeasance, or misfeasance, of public officers.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

RULE III

COMMISSION, ORGANIZATION & PROCEDURE

Section 1. ORGANIZATION OF THE COMMISSION:

The Commission shall, at its first regular meeting in October, elect one Commissioner to serve as chairman for a term of two years, or until a successor is duly elected. The Commission shall also, at the same meeting, elect one Commissioner to serve as vice-chairman for a term of two years, or until a successor is duly elected. If either of these offices is vacated because of death, resignation, or in any other manner, before the expiration of the incumbent's term of office, the Commission shall elect his successor at the next regular meeting of the Commission. The Director of Personnel shall act as secretary of the Commission.

Section 2. REGULAR MEETINGS:

Regular meetings of the Commission shall be held in the office of the Department at the Municipal Courts Building in the City of St. Louis, weekly, on Fridays, provided that the Commission may designate other times or places of regular meeting by giving public notice thereof. When the meeting day falls on a holiday the regular meeting shall be held on the following Tuesday.

Section 3. SPECIAL MEETINGS:

Special meetings may be called by any Commissioner or by the Director, upon giving advance notice to each Commissioner.

Section 4. RULES OF ORDER:

The Commission shall not be bound by any rules of order, evidence or procedure in its meetings, hearings, or investigations, except such as it may itself establish.

Section 5. QUORUM:

Two members of the Commission shall constitute a quorum for the transaction of business. Any meeting shall be adjourned in the absence of a quorum.

Section 6. POWER TO TAKE ACTION:

Neither the Commission or any member shall have power to take action except by majority vote in meeting assembled.

Section 7. MINUTES:

The Director, or in case of his absence, or disability, the person acting for him, shall attend all regular meetings of the Commission, shall act as its secretary and record its official actinos in the minutes. The time and place of each meeting of the Commission, names of Commissioners present, all official acts of the Commission, the votes of each Commissioner except when the acts are unanimous and, when requested, a Commissioner's dissent, with his reasons, and the actions of the Commission thereon, shall be recorded in the minutes. All communications and requests referred to the Commission for official action shall be appended to and made a part of the minutes. The Director shall cause the minutes to be transcribed and presented for approval or amendment at the next regular meeting. The official copy of the minutes and any amendments thereto, or a true copy thereof, certified by the Secretary of the Commission shall be kept at the offices of the Department and shall, subject to reasonable regulations, be open to the public inspection. (Rule III, Section 7, amended by Civil Service Commission, April 7, 1944.)

Section 8. APPEALS TO THE COMMISSION:

Any appointing authority, employee, or taxpayer of the City who feels himself aggrieved by the action of any appointing authority, or of the Director may appear before the Commission at a regular meeting and after having filed written complaint within ten (10) days after the effective date of such action shall have the right to be heard at reasonable length at the time designated by the Commission, on any matter involved in the administration and enforcement of Article XVIII, the rules, and ordinances adopted in accordance with Article XVIII. Any such appeals may also be filed in writing with the Director within ten (10) days after the effective date of such action, provided that at least six signed copies of such appeals are filed, whereupon it shall be the duty of the Director to transmit immediately a copy of the appeal to each Commissioner and the person complained against. The provisions of this section shall not apply in cases of dismissals which shall be governed by Rules IX and XIII. (Amended February 24, 1947.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

RULE VII

Section 7. TRANSFERS:

An appointing authority may at any time transfer any classified employee under his jurisdiction from one position to another position in the same class by giving written notice to the Director before the effective date thereof. Transfer of a classified employee from a position under the jurisdiction of one appointing authority to a position under the jurisdiction of another appointing authority may be made with the approval of the Director and the appointing authorities' consent, provided the positions are in the same class or a similar class requiring no additional or different tests of fitness and having the same maximum rate of pay. Any transfer of an employee from a position in a lower class to a position in a class carrying a higher maximum salary shall be deemed a promotional appointment and may be accomplished only in the manner provided in these rules for making promotional appointments. Any transfer from a position in a higher class to a position in a class carrying a lower maximum salary shall be deemed a demotion, and may be effected only in the manner...

RULE IX

SEPARATIONS AND DISCIPLINARY ACTIONS

Section 1. TENURE:

Every employee who is legally appointed as a result of certification from an appropriate eligible list and who successfully completes his or her working test period shall have indefinite tenure of employment in the classified service during meritorious service.

Section 2. LAYOFFS:

Whenever there shall be no further need for employment in any position because of either a stoppage of work or lack of available funds or for any other reason, such position may be abolished and regular employees in the classified service may be laid off without pay, despite any provisions of the rules concerning tenure. The Director of Personnel shall establish procedures for such layoffs. Employees who are laid off shall have their names placed on an appropriate reemployment list or lists and shall be entitled to reappointment if their position is refilled during the period of their eligibility on such reemployment list. Any such reemployment list which is composed of the names of employees who have been laid off in accordance with the provisions of these rules and of employees who have resigned in good standing shall be used in such a manner as to give priority in referral to positions in other agencies to those employees who have been laid off. In every case of layoff, the appointing authority shall give written notice of his or her action to the Director and the employee and shall certify therein that the layoff is for reasons not reflecting discredit on the employee. In cases where the appointing authority refuses or fails to so certify, the action shall be deemed a dismissal and shall be so treated.

Section 3. DISCIPLINARY ACTION:

Employees in the competitive service may be removed, demoted, reduced in pay, or suspended without pay for just cause.

(a) Reasons for disciplinary action; appointing authority to take such action:

- When any employee in the competitive service is unable or unwilling to perform the duties of his or her position in a satisfactory manner, or has committed an act or acts to the prejudice of the service, or has omitted to perform an act or acts it was his or her duty to perform, or who has removed his or her place of residence from the City of St. Louis, or whose service rendered is below satisfactory standard, or otherwise has become subject to disciplinary or other corrective measures, the appointing authority shall have the power and it shall be his or her duty to take action in one of the following ways:

(1) To reprimand or bring to the attention of the employee the deficiency or action which may subject the employee to other disciplinary action.

(2) To suspend the employee without pay for a period not to exceed twenty-eight (28) days.

(3) To order the pay of the employee reduced to a lower rate within the range of pay provided for the class of position in accordance with provisions in the compensation ordinance then in effect.

(4) To demote the employee to a class of position in which, in the opinion of the appointing authority, the employee will be able to function successfully.

(5) To dismiss the employee from the City Service.

(6) To retire the employee under the terms of any retirement act under which the employee is entitled to benefits.

(b) Employees in the competitive service who have not yet completed a working test period for their position may be removed or otherwise disciplined for such reasons the appointing authority may deem necessary and shall not have right of appeal in accordance with Rule XIII.

Section 4. PROCEDURE IN DISCIPLINARY ACTIONS:

(a) Counseling/Reprimands: Verbal counseling and/or written reprimands of an employee shall be made a part of the employee's departmental personnel record, providing, however, the Director may require that such actions be reported to the Department of Personnel in connection with the review of more serious disciplinary actions.

(b) Suspensions without pay and reductions in pay: The appointing authority shall notify the Director, in the manner and form prescribed by him, whenever any employee is suspended or reduced in pay indicating the reasons therefor and the duration of the suspension or reduction in pay and such action shall not be revocable by the Director. Suspensions shall not exceed twenty-eight (28) days for any one offense and suspensions totaling more than twenty-eight (28) days in any twelve (12) successive months shall be deemed a dismissal and so treated. Any reduction in pay shall be made in accordance with procedures established in the compensation ordinance.

(c) Dismissal and demotion: Any dismissal or demotion shall be reported to the Director in writing and a copy of such notice shall be given to the employee and shall include a notice of the employee's right of appeal and the reasons

for the action. The Director shall, within a reasonable time, in every such case, review the circumstances surrounding the action to assure that it is being taken on the grounds of merit and fitness. In the event the action is approved, the Director shall advise the employee of the approval. In the event the action is disapproved, the Director shall notify both the appointing authority and the employee and the employee shall be continued in the same status in the position, providing, however, that the appointing authority shall retain the right of appeal to the Commission. Such appeal from the decision of the Director shall be taken in accordance with Rule XIII.

(d) Removal by the Director for fraud or other acts to the prejudice of the service: The Director shall remove any employee at once if he finds, after investigation and after giving the employee notice and an opportunity to be heard, that the employe was appointed as the result of fraud or a material misstatement of fact, or that the employee has committed a serious act to the prejudice of the service in connection with an examination or other official function carried out by the Department of Personnel.

Section 5: RESIGNATION:

(a) Submission of resignation: Any employee in good standing who shall decide to leave the City Service for any reason, shall submit a formal resignation in writing to his or her appointing authority, a copy of which shall be forwarded to the Director.

(b) Review: Upon receipt of the resignation, the Director shall conduct a review as he shall deem proper and necessary to determine that the resignation was submitted in good faith by the employee. In the event the Director determines that the resignation was forced, such action shall be deemed to be dismissal from the City Service and the employee shall retain any right of appeal provided by the rules.

(c) Whenever resignations within any organizational unit are, in the opinion of the Director, excessive, the Director may determine that it is appropriate to conduct an investigation, and in such case he shall have the power to investigate the cause of such resignations and to initiate action to remove such causes. (Rule IX, amended by the Civil Service Commission March 3, 1981.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

RULE XIII

APPEALS, HEARINGS, INVESTIGATIONS & REVIEWS

Section 1. APPEALS:

The Commission shall have power, and it shall be its duty to consider and determine any matter involved in the administration and enforcement of Article XVIII and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the Director, or on appeal by any appointing authority, employee, or taxpayer of the City, from any act of the Director or of any appointing authority. The decision of the Commission in all such matters shall be final, subject, however, to any right of action under any law of the State or of the United States.

(a) Appeals by employees from disciplinary actions: Any regular permanent employee in the competitive service, subject to the provisions of Article XVIII and these rules, who believes that he or she has been dismissed, retired, or demoted without just cause may, within ten (10) days after the effective date of such action, request in writing a hearing to determine the reasonableness of such action. Any regular permanent employee in the competitive service, subject to the provisions of Article XVIII and these rules, who believes that he or she has been suspended or reduced in pay without just cause may, within ten (10) days after the effective date of such action, request in writing a review to determine the reasonableness of such action. The Commission shall act on the employee's request in an expeditious manner and shall grant the employee such hearing or other review as soon as possible considering the nature of the appeal and the Commission's docket of hearings and reviews.

(b) Decision of the Commission: After hearing and considering the evidence for and against the employee, the Commission shall prepare a report of its findings and approving or disapproving the disciplinary action. In case of approval, the disciplinary action shall be deemed final as ordered. In case of disapproval, the Commission shall order the reinstatement or transfer of the employee or such other action as it deems suitable and order full pay for the time lost as the result of disciplinary action found to have been taken because of the employee's race, national origin, sex, political or religious affiliations or beliefs, age, physical disability which does not affect job performance, or in such other cases as the Commission deems appropriate.

(c) Appeals for disapproval of disciplinary actions by appointing authority: Whenever the Director, after review of a dismissal or demotion ordered by an appointing authority, shall indicate disapproval of the action, the appointing authority may request in writing a hearing to determine the reasonableness of such decision. The Commission shall act on the appointing authority's request in an expeditious manner and shall grant a hearing scheduled as soon as possible considering the nature of the appeal and the Commission's docket of hearings.

(d) Decision of the Commission: After hearing and/or reviewing and considering the evidence for and against the employee, the Commission shall prepare a report of its findings, approving or disapproving the disciplinary action. In the case of approval, the disciplinary action shall stand as made by the appointing authority. In the case of disapproval or modification, the employee shall be restored to his or her former status or the actions shall be modified as ordered by the Commission.

Section 2. DISCIPLINARY ACTION FOR NON—MERIT REASONS:

If the Commission finds that any disciplinary action was for reasons of race, national origin, sex, political or religious affiliations or beliefs, age, or physical disability which does not affect job performance, then the employee shall be immediately reinstated in his position and be reimbursed for any loss of pay occasioned by such disciplinary action.

Section 3. ADMINISTRATIVE AND OTHER APPEALS:

(a) In reviewing any appeal made under these rules the Commission may defer its consideration until a determination procedure established or approved by the Director of Personnel. In cases of the existence of an established administrative appeals procedure, all matters appealable under such procedure shall be dealt with through such procedure unless the Commission determines that it is appropriate to assume original jurisdiction. Determinations made under any administrative appeals procedure adopted or approved by the Director of Personnel which are subsequently appealed to the Civil Service Commission may be determined on the basis of the record of such proceedings, or through such other hearing, investigation, review, or submission of additional information as the Commission deems appropriate. Appeals to the Commission of the results of any approved administrative appeals procedure of any matter otherwise appealable shall be made in writing within ten (10) days after the date of notification of the results of the administrative appeal.

(b) Appeals to the Commission on matters involved in the administration and enforcement of Article XVIII and these rules not involving disciplinary action shall be made in writing within ten (10) days after the effective date of the action being appealed. Such appeal shall set forth the point at issue and the reason or reasons for the request.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

DEPARTMENT OF PERSONNEL ADMINISTRATIVE REGULATION NO. 92

TO: DEPARTMENT HEADS AND APPOINTING AUTHORITIES

FROM: WILLIAM C. DUFFE, DIRECTOR OF PERSONNEL

SUBJECT: LAYOFFS

The Rules of the Department of Personnel and Civil Service Commission provide that employees in the competitive service may be laid off for lack of funds. When it is necessary for an appointing authority to reduce the number of employees, the layoff shall be made as follows:

1. LAYOFF UNIT & SELECTION OF POSITIONS

A. Layoffs shall be made within a unit composed of all employees under the jurisdiction of an appointing authority as set forth in the City Charter or ordinance.

B. The appointing authority shall select the class or classes of position in which layoffs will be made, and also determine the number of employees to be laid off in each class selected. The Department of Personnel will review the proposed list of number and class titles of positions to be eliminated for compatibility with the classification system and good management practice.

C. Due to the unique and specialized training required for individual classes of position in the physician staff group and physician management group, the layoff procedure outlined in this Administrative Regulation will not apply. If layoffs are required for the physician staff group and physician management group, the positions to be eliminated will be identified by the appointing authority and submitted to the Director of Personnel for approval.

2. ORDER OF LAYOFF

A. Layoffs in the competitive service shall be made on the basis of last Service Rating grade as the first and most important factor, and then by length of service as the second factor. The order of layoff of employees *in a given class of position in the layoff unit* will be as follows:

(1) Employees serving in a provisional appointment by inverse order of employment.

(2) Employees serving under a limited-term appointment in inverse order of employment.

(3) Employees in their probationary working test period in inverse order of employment.

(4) Permanent employees whose last Service Rating was Unsatisfactory in inverse order of employment.

(5) Permanent employees whose last Service Rating was Inadequate by inverse order of employment.

(6) Permanent employees whose last Service Rating was at least Adequate by inverse order of employment.

B. All employees in the unit in the selected class of position having employment status as described above in paragraph (1) must be laid off first, next all employees described in paragraph (2), then all employees described in paragraph (3), etc. This procedure shall continue through the employees described in paragraph (6), or as far as is necessary in order to lay off the required number of employees.

3. PROCEDURE

A. When an appointing authority determines that a layoff is necessary, he shall immediately notify the Department of Personnel of: (1) the reason for the layoff; (2) the classes of position and number of employees in each class to be laid off; and (3) the effective date of the layoff.

B. The Department of Personnel will determine the order of layoff for the unit as outlined above and advise the appointing authority. In order to make the list of the order of layoff it is necessary for the Department of Personnel to have the Service Ratings of all employees in the unit for rating periods prior to the effective date of the layoff.

C. In order to consumate the actual layoff it will be necessary to prepare a "Change in Employee Status" form DP-202 (rev. 1/68) for each employee certifying the reason for the layoff as being for lack of funds and that it does not reflect discredit on the employee. The Department of Personnel will advise the appointing authority of the proper wording to be used on the "Change in Employee Status" form.

D. Employees being laid off shall be granted all accrued authorized compensatory time and vacation leave, if any.

E. An employee being laid off should, whenever possible, be given ten days notice before his last day on the payroll.

4. GENERAL

A. Length of service will be determined by the Department of Personnel. An individual's length of service is determined from the date of regular appointment or reemployment in a position in any department in the competitive service of the City of St. Louis.

B. Employees in competitive positions funded by grants

who are employed in the regular manner will be considered a part of the established layoff unit.

C. Employees in non-competitive positions which are filled through procedures, such as the procedure used in the PSE program, will be terminated in accordance with Federal Program guidelines and procedures established by the Department of Personnel.

D. The layoff procedures in this Administrative Regulation are effective immediately. This Administrative Regulation supercedes and cancels Administrative Regulation No. 58.

Additional copies of this Administrative Regulation may be obtained from Mrs. Linda Thomas or Miss Josephine Profeta of the Department of Personnel, 622-3567.

Department of Personnel

/s/ William C. Duffe
Director of Personnel

April 2, 1976
Reissued April 22, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 9

Where more than one claim is involved, as in this case, you should consider each claim, and the evidence pertaining to it, separately, as you would had each claim been tried before you separately.

Unless otherwise stated, the jury should consider each instruction given to apply separately and individually to each plaintiff and to each defendant in the case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 9A

It is stipulated by the parties that defendants' acts were done under color of state law.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 10

Although there are four defendants in this action, it does not follow from that fact alone that if one is liable, all are liable. Each defendant is entitled to a fair consideration of his own defense, and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. Unless otherwise stated, all instructions given you govern the case as to each defendant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 13

Section 1983 of Title 42 U.S.C.A. provides that any inhabitant of this Federal District may seek redress in this Court, by way of damages, against any person or persons who, under color of any law, statute, ordinance, regulation, or custom, knowingly subject such inhabitant to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 14

The statute just outlined to you comprises one of the Civil Rights Acts enacted by the Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution provides that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 15

As a general principle, a municipality is not liable under 42 U.S.C. 1983 for the actions of its employees. However, a municipality may be held liable under 42 U.S.C. 1983 if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 16

An individual defendant may not be held liable under 42 U.S.C. 1983 unless he was personally involved in causing the deprivation of a constitutional right or he either has or is charged with having actual knowledge that his subordinates are causing deprivations of constitutional rights.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 17

A municipality is liable under 42 USC 1983 only for a constitutional deprivation visited pursuant to an unconstitutional governmental custom, usage or official policy knowingly followed by the municipality.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

PLAINTIFF'S INSTRUCTION NO. 19

The Charter of the City of St. Louis and the rules and regulations of the Civil Service Commission of the City of St. Louis provide that a permanent civil service employee may be laid off only for lack of work and/or lack of funds.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 20

The First Amendment to the Constitution of the United States states, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Further, the mandate of this amendment is made applicable to the States, and to political subdivisions of the States by means of the Fourteenth Amendment to the Constitution of the United States.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 22

In regard to plaintiff's claim that defendants retaliated against him because of his exercise of his right to free speech and his right to petition for redress of grievances:

Your verdict must be for the plaintiff James Praprotnik and against the defendants on plaintiff's claim of violation of his First Amendment rights if you find by a preponderance of the evidence:

1. That plaintiff's action in appealing his suspension involved the exercise of free speech and the right to petition for redress of grievances; and

2. That a substantial or motivating factor in the decision to transfer and lay plaintiff off was his exercise of his right of appeal to the Civil Service Commission, and that plaintiff would not have been transferred or laid off but for his appeal to the Civil Service Commission; and

3. That defendants Hamsher, Patterson and Kindleberger are high government officials of the City of St. Louis with the right to make policy decisions and to speak for the defendant City of St. Louis.

4. That defendants Hamsher and Kindleberger were personally involved in causing plaintiff's transfer and/or layoff; and

5. That defendant Deborah Patterson was personally involved or knew of the participation of her subordinates in causing deprivation of plaintiff's constitutional rights, and

6. That plaintiff was damaged thereby.

If you find that the plaintiff has established each of these elements of his claim, you will then consider the defendants' defenses as to which the defendants have the burden of proof by a preponderance of the evidence. It is not unlawful for the defendants to transfer plaintiff and lay him off for bonafide business reasons. Your verdict must be for the defendants and against the plaintiff if you find by a preponderance of the evidence:

1. That plaintiff was transferred to the Division of Heritage and Urban Design because of the transfer of functions; and

2. That plaintiff was laid off from his position because of lack of funds; and

3. That the actions taken were reasonably necessary to the business operations of the City of St. Louis.

In the event that you are convinced by the evidence that defendants' actions were substantially motivated by plaintiff's appeal of his suspension, then you must determine the amount of damages the plaintiff sustained.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 23

In regard to plaintiff's claim that he was laid off in violation of his rights to due process under the 14th Amendment and 42 USC 1983 in the deprivation of his property interest in his job:

Your verdict must be for the plaintiff James Praprotnik and against Defendants Hamsher, Kindleberger and Patterson, if you find by a preponderance of the evidence:

1. That plaintiff was laid off for reasons other than lack of funds; and

2. As to defendants Kindleberger and Hamsher, that they were personally involved in the decisions which led to the layoff of the plaintiff; and

3. As to defendant Deborah Patterson, that shw was either personally involved or knew of the participation of defendants Hamsher and Kindleberger in the decision to lay off plaintiff; and

4. That the actions taken were done under color of law as defined in these instructions; and

5. That plaintiff was damaged thereby.

If you find that the plaintiff has established each of these elements of his claim, you will then consider the defendants' defenses as to which the defendants have the burden of proof by a preponderance of the evidence. It is not unlawful for the defendants to lay plaintiff off for lack of funds, which is a bonafide business reason. Your verdict must be for the defendants and against the plaintiff if you find by a preponderance of the evidence:

1. That plaintiff was laid off from his position because of lack of funds.

If you are convinced that plaintiff was laid off for a reason other than lack of funds, then you must determine the amount of damages the plaintiff sustained.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 24

In regard to plaintiff's claim against the City of St. Louis that he was laid off in violation of his rights to due process under the 14th Amendment and 42 U.S.C. § 1983 in the deprivation of his property interest in his job:

Your verdict must be for the plaintiff, James Praprotnik, and against the City of St. Louis if you find by a preponderance of the evidence:

1. That plaintiff was laid off for reasons other than lack of funds; and

2. That the layoff resulted from an unconstitutional custom, usage or official policy knowingly followed by the City of St. Louis; and

3. That poaintiff was damaged thereby.

Your verdict must be for the defendant City of St. Louis and again plaintiff, James Praprotnik, if you find:

1. That plaintiff was laid off for lack of funds; or

2. That, even if plaintiff was laid off for a reason other than lack of funds, said layoff was not the result of an unconstitutional government custom, usage or official policy knowingly followed by the defendant City of St. Louis; or

3. That plaintiff was not damaged thereby.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 25

If Defendants Hamsher, Kindleberger and Patterson reasonably believed that their actions were taken pursuant to valid provisions of the Charter of the City of St. Louis, Ordinances of the City of St. Louis, and Rules of the Civil Service Commission of the City of St. Louis, and acted in good faith on the basis of this belief, then their reasonable belief and good faith action would constitute a defense to the plaintiff's claim of deprivation of property without due process of law pursuant to 42 USC 1983.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 26

If you determine the issue of liability favorably as to the plaintiff, you can then assess damages based upon the violation of any of the plaintiff's substantive constitutional rights to property and to due process.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 27

If you find that the plaintiff has been deprived of a constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place upon constitutional rights can measure their importance in our society or compensate a citizen adequatey for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.

The precise value you place upon any constitutional right which you find was denied to plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, the significance of the right in the context of the activities which the plaintiff was engaged in at the time of the violation of the right.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. 29

If you find in favor of plaintiff, James Praprotnik, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the occurences mentioned in the evidence.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

INSTRUCTION NO. A

An isolated incident of illegal conduct on the part of a municipality's agents, servants or employees is not sufficient to establish a governmental custom, usage or official policy such as would give rise to liability on the part of a municipality pursuant to 42 U.S.C. 1983.

Rather, in order to establish such governmental custom, usage or official policy, it must be shown that the alleged illegal conduct is both systematic and municipally-supported.

Adickes v. S.H. Kress and Co., 398 US 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)

Berry v. McLemore, 670 F.2d 30 (1982).

Magayanes v. Chicago, 496 FS 812 (1980).

Defendant's Instruction No. ___________

Given ___________

Refused ___________

Withdrawn ___________

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287 C (3)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

VERDICT FORM

We, the jury in the above-entitled cause, make the following findings as to the plaintiff's claim against the defendants arising out of the issues of right to free speech and to petition for redress of grievances. A finding for the plaintiff against a defendant shall be indicated by writing "yes" on the appropriate line. A finding for an individual defendant shall be indicated by writing "no" on the appropriate line.

Defendant City of St. Louis	Yes
Defendant Frank Hamsher	No
Defendant Deborah Patterson	No
Defendant Charles Kindleberger	No

(If you find in favor of the plaintiff against any of the defendants, you must complete the following.)

We assess plaintiff's damages as follows:

FOR ACTUAL DAMAGES: $15,000

FOR PUNITIVE DAMAGES:
Defendant Frank Hamsher none
Defendant Charles Kindleberger none

11-19-84 /s/ Henry Dampier
Date Foreperson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-0287 C (3)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

VERDICT FORM

We, the jury in the above-entitled cause, make the following findings as to the plaintiff's claim against the defendants for loss of his job by reason of his layoff for the pretextual reason of lack of funds. A finding for the plaintiff against a defendant shall be indicated by writing "yes" on the appropriate line. A finding for an individual defendant shall be indicated by writing "no" on the appropriate line.

Defendant City of St. Louis	Yes
Defendant Frank Hamsher	No
Defendant Deborah Patterson	No
Defendant Charles Kindleberger	No

(If you find in favor of the plaintiff against any of the defendants, you must complete the following.)

We assess plaintiff's damages as follows:

FOR ACTUAL DAMAGES: $15,000

FOR PUNITIVE DAMAGES:
Defendant Frank Hamsher none
Defendant Charles Kindleberger none

11-19-84 /s/ Henry Dampier
Date Foreperson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 83-287C (3)

James H. Praprotnik,
Plaintiff,

vs.

City of St. Louis, Frank Hamsher, Charles
Kindelberger, and Deborah Patterson,
Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable William L. Hungate, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict;

IT IS ORDERED AND ADJUDGED that, in accordance with the jury's verdict, the plaintiff recover of the defendant City of St. Louis on plaintiff's claim arising out of the issues of right to free speech and to petition for redress of grievances and for loss of his job by reason of his layoff for the pretextual reason of lack of funds the sum of THIRTY THOUSAND DOLLARS ($30,000.00), with interest thereon at the rate of 10.33% per annum and costs.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff take nothing by his cause of action against defendants Frank Hamsher, Charles Kindelberger, and Deborah Patterson, that the action be dismissed on the merits, and that the defendants recover of the plaintiff their costs of action.

EYVON MENDENHALL, CLERK
By: Florence H. Bertel, Deputy Clerk

Dated at St. Louis, Missouri,
this 19th day of November, 1984.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF ST. LOUIS,
Petitioner,

vs.

JAMES H. PRAPROTNIK
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the failure of a local government to establish an appellate procedure for the review of officials' decisions which does not defer in substantial part to the original decisionmaker's decision constitutes a delegation of authority to establish final government policy such that liability may be imposed on the local government on the basis of the decisionmaker's act alone, when the act is neither taken pursuant to a rule of general applicability nor is a decision of specific application adopted as the result of a formal process?

2. Whether principles of causation applicable to actions brought against officials and local governments pursuant to 42 U.S.C. §1983 differ such that a judgment may be rendered against a local government despite the return of a verdict exonerating the local official who was alleged to have promulgated the unconstitutional policy and to have acted pursuant to that policy?

PARTIES BELOW

The parties in the Court of Appeals were the City of St. Louis, defendant and appellant, and James H. Praprotnik, plaintiff and appellee.

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No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF ST. LOUIS,
Petitioner,

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JAMES H. PRAPROTNIK
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was filed August 19, 1986 and is reported as *Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir. 1986).

JURISDICTION

The judgment of the Court of Appeals was filed August 19, 1986. The petition for rehearing was denied September 19, 1986. Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. I provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"), 17 Stat 13, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF CASE

As defendants' counsel admitted at the outset of the trial (R. 1-15), there is little dispute about the evidentiary facts of this case. Plaintiff James Praprotnik is an architect who was employed by the City of St. Louis beginning in 1968. Since 1980 he served as a "city planner IV" with the City's Community Development Agency (CDA), a department of City government primarily occupied with disbursing federal funds for urban redevelopment projects (R. 1-25, 30). Plaintiff enjoyed good to excellent job evaluations through 1980 when he became embroiled in a controversy that was the seed from which this lawsuit blossomed.

Donald Spaid, the director of CDA, promulgated a "secondary employment" policy that sought to control outside employment by CDA architects out of his concern that real or apparent conflicts of interest might arise from such relationships (R. 3-216-218). Plaintiff resented the policy, believing that the requirement that he identify his private clients constituted "... an invasion of my personal and family privacy and carry overtones of discrimination and personal vendettas" (R. 2-34). The controversy culminated on April 29, 1980 when Kindleberger suspended plaintiff for fifteen days (R. 1-46) (R. 3-16, 219) (Def. Ex. I-4; R. 2-20)[1].

Plaintiff appealed his suspension to the City's Civil Service Commission, a body which was required to consider employee appeals of employment decisions, which decisions were required by the City Charter to be made on the sole basis of "merit and fitness" (J.A. 49, 63). Plaintiff had mixed success with his appeal: the Commission found that his conduct regarding outside employment was such that he might be properly subject to sanctions, but that the discipline imposed was excessively harsh under the circumstances (R. 1-47) (R. 3-221). The Commission reversed plaintiff's suspension, awarded him backpay, and directed his supervisors to give him a letter of reprimand (R. 1-47) (R. 3-221) (Def. Ex. I-8; R. 2-20).

The Civil Service Commission's decision rendered October 31, 1980 (R. 1-47) (Def. Ex. I-8; R. 2-20) was to be, in plaintiff's view, a turning point in his City career. On October 30, he received his annual evaluation from Kindleberger (R. 1-54) (R. 3-226). Plaintiff's evaluation was made in the midst of a major re-evaluation of the City salary structure, which had been occasioned by an amendment to the City Charter removing the anachronistic $25,000 limit on salaries for all employees (R. 3-98-100). Mayor James Conway had ordered the evaluation to prevent windfalls for employees who had progressed up the steps of their pay grades over the years without displaying any special merit (R. 3-102-103). Many employees, whose performances were deemed satisfactory, were reduced to a lower step within their grade (without a pay decrease) because the higher step upon which they had been placed required exceptional, not merely good, performance (R. 3-34-38).[2] Kindleberger gave plaintiff a rating of "good", but recommended that plaintiff's place on the salary schedule be reduced by two grades (R. 3-226, 228). This apparently contradictory recommendation is explained as a result of the reevaluation process (R. 1-54). Plaintiff viewed the action as a reprisal for his success before the Civil Service Commission, and sought review before the service ratings appeal board (Pl. Ex. 24, R. 1-54) (Def. Ex. J-3, R. 2-20). That board, with the approval of the Director of Personnel, upgraded some of plaintiff's ratings and ordered that plaintiff be reduced in grade only one pay step (Def. Ex. J-8, R. 2-20).

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[1] Almost all of the exhibits were admitted on the same page of the transcript where they were offered.

In April, 1981 the City faced a shortfall of $54 million in revenues (R. 3-140). Mayor Schoemehl, who had succeeded Mayor Conway that April, joined with other officials in slashing the City's budget, resulting in some 5,000 city employee layoffs (R. 3-248). Frank Hamsher, an appointee of the new mayor, succeeded Spaid at CDA, that April (R. 1-59). Hamsher's first few weeks in office were occupied almost entirely with deciding how to eliminate employees and reduce costs (R. 1-58-59) (R. 3-141). Eventually, CDA was halved in size, and some eighty people were laid off or transferred to other positions in the City (R. 3-105-106). Plaintiff's planning section was reduced from nine to three persons (R. 1-58-59) (R. 3-141).

---

[2] The reevaluation that lead to the reduction in grade of many competent city management employees who had not displayed a job performance "clearly commendable and distinguished " is described in *Bosse v. Civil Service Commission of City of St. Louis*, 658 S.W.2d 66 (Mo.App. 1983).

Plaintiff took the reduction in staff, the reassignments of work, and the alteration in budgets personally, seeing them as additional reprisals. He complained in a memorandum to Hamsher (Def. Ex. M-1; R. 2-20), who did not respond. In October, 1981, plaintiff was again rated by his superiors, one Karetski and Kindleberger (R. 2-58) (R. 3-227-228) (Pl. Ex. 56; R. 1-64). Once more, plaintiff felt he suffered a reprisal: he was rated "adequate" in some categories, but "inadequate" in his "relationships" (R. 2-58, 61) (R. 3-228). He appealed, again with some success (R. 2-60) (R. 3-103). The service rating appeals board, upheld by the Civil Service Commission, ruled that an inadequate rating be raised to adequate (R. 1-66) (R. 2-58-61) (Def. Ex. 0-3; R. 2-20) (Def. Ex. N-1, R. 2-20) (Def. Ex. 0-6, R. 2-20) (Def. Ex. AA-1; R. 2-20).

In April, 1982, coincident with preparations for the City's next fiscal year, CDA's budget was targeted for additional reductions (R. 3-166). Many of plaintiff's colleagues were transferred or laid off (R. 2-109) (R. 3-41). Indeed, 40% of the staff would ultimately be laid off in this second round (R. 3-173). At that time, plaintiff was the senior employee in his job classification ("city planning manager") at CDA (R. 1-61). Kindleberger considered a number of possible layoff and transfer combinations to achieve necessary staff cuts in his division, which included plaintiff's section (R. 3-242). In addition, the City's Heritage and Urban Design Division, which derived its operating funds from federal block grants administered by CDA, was seeking approval to hire someone with urban planning and architectural qualifications to perform design review work in connection with redevelopment in the City's historic districts (Pl. Ex. 53; R. 71-72) (Pl. Ex. 119, 121; R. 1-72-73) (Pl. Ex. 124, 125; R. 2-3).

In what plaintiff believed was yet another reprisal, Hamsher transferred additional design review functions to Heritage from CDA. The director of Heritage and Urban Design was then able to accept a transfer of a city planning manager from CDA, in lieu of hiring a lower-level planner (R. 1-68-73) (R. 3-169-71) (R. 3-115). It is important to note that Donald Spaid, the supervisor who was "down on" plaintiff, was no longer with CDA at the time of the transfer. The director of Heritage, Henry Jackson, agreed to the transfer, but was unhappy that his division was getting more work but only one additional high-level employee (R. 3-171-76) (R. 3-203-204). Jackson's own superior, Thomas Nash, director of the City's Department of Public Safety, also approved.[3]

On March 23, 1982, Hamsher transferred plaintiff to Heritage, with no reduction in pay (R. 3-116), laid off one of the other city planning managers junior to plaintiff, and kept the third at CDA (R. 1-66-67). No one contemplated that plaintiff would be laid off by Heritage (R.3-202).

Predictably, plaintiff objected to his transfer. He retained counsel, and appealed to the civil service commission (R. 3-92, 117). The commission declined to hear the appeal, on the ground that plaintiff had lost nothing (R. 3-117-19). In response, plaintiff filed suit in United States District Court against the City, Kindleberger, Hamsher, Jackson and Deborah Patterson (Hamsher's successor at CDA), alleging that the transfer was unconstitutional.

Plaintiff's new assignment turned out badly. Many of the architectural duties were performed by Jackson and plaintiff was left with unchallenging clerical functions (R. 2-67). In addition, plaintiff, now embittered, engaged in a series of disputes with Jackson and with Robert-Killen, who replaced Jackson in the Fall of 1982 ((R. 2-165). Both Jackson and Killen made personnel decisions adverse to plaintiff, and plaintiff was accorded some relief in this regard through successful appeals to the Civil Service Commission (R. 1-80-81) (Def. Ex. Ee-4; R. 2-19) (R. 2-72) (Pl. Ex. 141; R. 1-6) (Def. Ex. EE-15; R. 19) (Def. Ex. JJJ-1; R. 2-64) (R. 2-73).

In the Fall of 1983 Nash determined that two jobs could be created with the funds necessary to carry plaintiff's position (R. 2-188-89). Nash viewed the layoff as a "minor reorganization," necessitated by lack of funds, to provide sufficient personnel to handle the workload (R. 2-194-95) (R. 2-180-82).

Plaintiff's layoff complied with the procedures laid down by the Civil Service Commission, insofar as advanced notice of layoff was given, with a notation that the reason for the layoff was lack of funds, and that the layoff did not reflect discredit on plaintiff (Def. Ex. BBBB-6; R. 3-77). At the time of plaintiff's layoff, defendant Hamsher was a member of the Mayor's staff, with responsibilities unrelated to supervision of plaintiff or any other employee. He was not consulted regarding the layoff (R. 3-181).

Plaintiff amended the lawsuit to include a challenge to his layoff claiming that both the transfer and layoff violated his First Amendment and Due Process rights (J.A. 12-19). Plaintiff also appealed to the Civil Service Commission from the layoff (R. 2-73). Evidently the lawsuit pretermitted further proceedings on his civil service appeal, which is still pending. *Id.*

The case went to trial before a jury in November of 1984. Plaintiff's opening argument is particularly interesting, for the basis of the liability sought to be imposed upon the City was finally disclosed:[4] "If [the acts] were done by high-ranking City officials, then the responsibility lies with the City because we contend that this then constituted a custom or practice on the part of the City over a period of years to eliminate people for the exercise of their rights of appeal and for whatever other reasons that existed" (R. 1-14).

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[3] Under the rules of the civil service commission, transfers could be accomplished with the consent of "appointing authorities." Consent of the employee was not required, but approval from the Department of Personnel was (R. 3-114). Several of plaintiff's witnesses were transferred in 1981 or 1982, even though they had seniority in their classifications at CDA (R. 2-109) (R. 2-146-147).

[4] Plaintiff's amended complaint did not allege that either plaintiff's transfer or his layoff was effectuated pursuant to a City policy, nor did it identify what that policy was, evidently contemplating that liability might be imposed upon the City on a respondeat superior theory (J.A. 12-19). Indeed, the trial court dismissed plaintiff's complaint against the City (J.A. 5), only to later reinstate it (J.A. 7).

Contrary to plaintiff's prediction, there was no evidence at all that any City employee, other than plaintiff, had suffered as a result of having filed appeals with the Civil Service Commission. The evidence at trial disclosed very little about defendants Kindleberger, Hamsher and Patterson. Kindleberger, of course, was one of plaintiff's superiors during his tenure at CDA. Hamsher was director of that agency, and later an advisor to the Mayor but without operational responsibilities. None of the named defendants was shown to have any particular responsibility to formulate City policy in the matter of personnel management, except to the extent that each of them played a role as "appointing authority" in the City's civil service structure, and as such had the duty to supervise employees under his direction. Hamsher and Patterson, as directors of CDA respectively, also had supervision of the agency's budget decisions and grant agreements (e.g., the grant agreement providing funds for Heritage). Except for the opinion evidence of plaintiff and several of his witnesses (R. 2-81), and except for routine approval of budgets by the City Board of Estimate and Apportionment (on which the Mayor sat), there was no evidence that the Mayor or his chief of staff instigated or was involved in any decision affecting plaintiff (see, e.g., R. 3-186). Plaintiff presented specific evidence of animosity only on the part of former director Spaid, whom plaintiff blamed for many of the evils befalling him (e.g., R. 2-75).

Counsel for the City made motions for directed verdict at the close of plaintiff's evidence and at the close of all the evidence arguing that there was no evidence of a city policy that directly caused plaintiff's injury (R. 3-15; R. 4-21-22). The City's motion were denied (*Id.*)

Perhaps realizing the paucity of evidence on city policy, plaintiff changed gears during closing argument. The city policy upon which liability was to be imposed was now identified thusly:

> Well, what they were doing, they were laying off people, that's the usage; that's the custom. They were laying them off for lack of funds. That's the usage and that's the custom (R. 4-62).

The jury returned verdicts exonerating all of the individual defendants, (Kindleberger, Hamsher and Patterson), but finding against the City of St. Louis on both the Due Process and First Amendment claims and awarding plaintiff $15,000 for each (J.A. 128-129). The City of St. Louis appealed, following the denial of its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

A panel of the United States Court of Appeals for the Eighth Circuit affirmed the District Court in part, and reversed in part. *Praprotnik v. City of St. Louis,* 798 F.2d 1168 (8th Cir. 1986). The due process claim was vacated because the court believed that the award was either an improper duplication of the First Amendment claim, or an award for a Due Process claim where no substantive claim was cognizable. *id.* 798 F.2d at 1177-1178. The award of $15,000 on the First Amendment claim against the City was sustained. Judge Lay's analysis centered on Hamsher's decision to transfer Praprotnik, the circumstances surrounding which he believed were sufficient to justify the inference that the transfer was improperly motivated and which transfer he believed constituted a constructive discharge. *Id.* 798 F.2d at 1176. Because neither the transfer nor the layoff was subject to a review process that did not defer in substantial part to the decisionmaker, Hamsher's decision was deemed city policy. *Id.* 798 F.2d 1174-1175.

The City filed its Petition for a Writ of Certiorari in this Court to review that opinion.

SUMMARY OF THE ARGUMENT

1.a. In *Monell v. Dept. of Social Service,* 436 U.S. 658 (1978) the Court held that cities may be held liable pursuant to 42 U.S.C. §1983 for constitutional injuries inflicted pursuant to city policies. In the Court's post-*Monell* decisions there has been some progress toward providing greater clarity to the concept of liability engendering city policy, but a majority of the Court has not yet unambiguously endorsed a particular definition. One view, exemplified by Justice Brennan's concurring opinion in *City of Oklahoma City v. Tuttle,* 471 U.S. 808 (1985), and Part II-B of his opinion announcing the judgment of the Court in *Pembaur v. Cincinnati,* 475 U.S. ____, 89 L.Ed.2d 452 (1986), finds that a policy has been made where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur,* 89 L.Ed.2d at 465. A competing view, exemplified by Chief Justice Rehnquist's opinion in *Tuttle,* 471 U.S. 808, and by Justice Powell's dissenting opinion in *Pembaur,* finds city policy only in: a) rules of general applicability established by official action; and (b) decisions of specific application adopted as the result of a formal process. *Pembaur,* 89 L.Ed.2d at 475-476 (Powell, J., dissenting). Both views, however, demand that policies be made by policymakers.

b. The *ratio decidendi* of the opinion below is that the decision of Frank Hamsher, plaintiff's supervisor, to transfer plaintiff was a city policy because Hamsher's transfer decision was not subject to a review by other officials that did not defer in substantial part to Hamsher's original decision. Consistent application of this principle means that almost all decisions of city employees are policy because cities do not and cannot establish review processes, let alone appeals procedures of a particular kind, to review all decisions of their employees. Adoption of the view below would thus be inconsistent with the intention of Congress that innocent taxpayers should not be punished. *City of Newport v. Facts Concerts, Inc.,* 453 U.S. 247, 266 (1981).

c. A city policy is not made when an employee makes a decision that is contrary to orders or rules that are binding upon him. More than this, a city policy is only made when a decision is made by one in whom the ultimate authority to make such decisions is placed by the city's fundamental law, for it is only then that the city's taxpayers and voters may be said to be at fault: for it is only then that those in whom they have entrusted with the authority to make such decisions are at fault.

d. If indeed Frank Hamsher transferred plaintiff in retaliation for the filing of the appeal with the Civil Service Commission, then he violated a policy that was implicit in the City Charter provisions that established the civil service appeals process. There was no evidence that there was a widespread practice tolerated by City officials contrary to the policy expressed in the Charter. Moreover, Frank Hamsher did not have the authority to make City employment policy. That policy, in the first instance, was set by the Charter. Employment policy was made, within the confines of the Charter, by the Civil Service Commission. There was no evidence that the Commission promulgated or tolerated a practice of retaliatory firing. Thus, Hamsher's decision to transfer plaintiff was not City policy.

2. The City policy upon which liability was imputed to the City was Hamsher's decision to transfer plaintiff; the act for which plaintiff sought to impose liability on Hamsher as an individual defendant was Hamsher's act transferring plaintiff. Since Hamsher's decision and his act are distinct only analytically, the verdict exonerating Hamsher can be reconciled with the verdict against the City only if the principles of causation are applicable to individuals are different from those applicable to cities. They are not.

In *Mt. Healthy City School Dist. Board of Educ. v. Doyle,* 429 U.S. 274 (1977), the Court made it clear that factual causation is a predicate for constitutional tort liability. *Mt. Healthy* involved a local government, but it can hardly be doubted that an individual cannot be held liable for the commission of a constitutional tort where his acts or omissions are not the factual cause of an injury. The Court has held that proximate causation is applicable to §1983 cases brought against individuals. *Martinez v. California,* 444 U.S. 277 (1980). The Court should hold that principles of proximate causation are equally applicable to cities for there is nothing in the plain language of §1983 or its legislative history that suggests that different principles should apply, and the opinions of both Chief Justice Rehnquist and Justice Brennan in *Tuttle* suggest that proximate cause principles are applicable to cities. *Tuttle,* 85 L.Ed.2d at 804 and 810 n.9.

Hamsher's decision to transfer plaintiff was no more or less the cause, factual and proximate, of plaintiff's injury than was Hamsher's act transferring plaintiff. The verdicts were incompatible.

ARGUMENT

Introduction

In 1951 Justice Frankfurter, observing the disparate results in the Court's cases applying 42 U.S.C. §1983 and the Civil Rights Act of 1871, of which §1983 was a part, explained that "[s]uch differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning." *Stefanelli v. Minard,* 342 U.S. 117, 121 (1951). In 1985 Justice Blackmun, speaking from the pages of a learned journal, stated that "[t]oday, §1983 properly stands for something different - for the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful". Blackmun, *Section 1983 and Federal Protection of Individual Rights - Will The Statute Remain Alive or Fade Away,* 60 N.Y.U.L.REV. 1, 29 (1985). There is no inconsistency between Justice Frankfurter's complaint that §1983 was loosely and blindly drafted, and Justice Blackmun's paean. Congress created, in the two imprecise sentences that constitute §1983, a new tort, setting forth virtually nothing of its components or procedure. By contrast, a recent treatise explaining the fundamentals of tort law runs to six volumes. See Harper, James and Coray, The Law of Torts, 2nd Ed. (1986). Nevertheless, the broad scope of §1983 - a means by which all constitutional rights may be vindicated - enables it to perform the noble function Justice Blackmun so eloquently described. The courts generally, and this Court in particular, however, have been left with the difficult task of giving content to the new tort, with only the most meager assistance from the plain language of the statute, and from the legislative history. In no respect has this task been more difficult than with respect to the task of determining and defining the circumstances upon which liability may be imposed upon cities.

In 1961 the Court held that municipal corporations could not, under any circumstance, be subjected to liability pursuant to §1983. *Monroe v. Pape,* 365 U.S. 167 (1961). Seventeen years later a divided Court reversed itself, ruling that cities may be held liable pursuant to §1983, but only for constitutional injuries caused by the cities' policies. *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978). The Court's most important decisions applying *Monell* have been divided, culminating in *Pembaur v. City of Cincinnati,* 475 U.S. ____, 89 L.Ed.2d 452 (1986), which contained three concurring opinions, and a dissent in which three justices joined. This well illustrates the difficulty with which applying §1983 to this issue is fraught.

We believe that the opinion below represents such an extreme view of *Monell* that this is not a difficult case. This is not to say, however, that it is not an important case. One commentator, anticipating *Monell,* warned that "[i]n the absence of precise definition, the proposed concept of policy may seem so loose as to be capable of engulfing all municipal protection against vicarious liability." Levin, *The Section 1983 Municipal Immunity Doctrine,* 65 Georgetown L.J. 1483, 1540 (1977).[3] This prophecy has been realized: in the absence of a precise definition of policy, the trend has been "toward the imposition of liability in an ever-widening circle." Leuchtman, *Joint Liability in Police Misconduct Cases,* 60 Mich. B.J. 93, 96 (1981). This case, then, affords the Court the opportunity of giving the term "policy" greater clarity, at least by negative definition, and this is very important.

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[3] To its credit, the court below recognized the importance of precision in the definition of policy in ***Westborough Mall, Inc. v. City of Cape Girardeau,*** 794 F.2d 330, 338-339 (8th Cir. 1986), where it directed the trial court to give an instruction defining "official policy" on remand.

The lower court's opinion is held together by two slender threads. The first is the court's conclusion that Frank Hamsher, the city employee who transferred plaintiff, was a city policymaker because his decision to transfer plaintiff was not subject to a review by other city employees who did not defer in substantial part to his initial decision to make the transfer. The second is the lower court's belief that a rational jury did believe, based solely upon the basis of a post hoc ergo propter hoc inference, that Hamsher's decision to transfer plaintiff was motivated by plaintiff's appeal of his suspension under the regime of Hamsher's predecessor. The first holding is the subject matter of Part I below, where we argue that the opinion of the court below is inconsistent with what this Court has done in its municipal policy cases, inconsistent with what this Court has said in its municipal policy cases, and inconsistent with the intent of Congress. Indeed, it is at odds with common sense. In Part II we consider the perversity of the lower court's belief that the jury made a permissible inference that Hamsher was unconstitutionally motivated in light of the jury's verdict exonerating Hamsher. We conclude that in this respect also the lower court's opinion is inconsistent with this Court's cases and with common sense. The threads of logic thus broken, the result reached unravels and it remains only to reverse the decision.

I.

Hamsher's Decision To Transfer Plaintiff Was Not A Policy Of The City Of St. Louis: A) If Made In Retaliation For Plaintiff's Civil Service Appeal, It Was Contrary To City Policy; and B) Hamsher Did Not Have The Authority To Make Personnel Policy For The City, Even Though The City May Not Have Had An Appeals Process For Reviewing His Transfer Decisions Without Showing Deference To His Decisions.

Who speaks for the city? And when does he who may speak for the city speak for the city, and how does he do so? Finding answers to these difficult questions has been the task of the lower federal courts and of this Court since this Court's landmark decision in *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658 (1978), in which the Court held that municipal corporations and other local governments are liable under 42 U.S.C. §1983 for constitutional injuries inflicted pursuant to their policies, but leaving for another day the development of the full contours of the §1983 cause of action against a local government. Controversy has raged in the courts of appeals whether so-called "final" acts of city employees may, without more, be considered liability engendering municipal policies. Some courts, *see, e.g., Rookard v. Health & Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983), hold cities liable for such acts because the acts are thought to represent official policy; the Fifth Circuit, however, has rejected that view, believing that "policymaking authority is more than discretion, and *it is far more than the final say-so*, as a matter of practice, on what water main will be replaced today and whether a building meets city construction standards." *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985) (emphasis added).

The Eighth Circuit decision now being reviewed by writ of certiorari is a particularly extreme version of the former view, holding that "final authority" is placed in a city employee such that his decision may be deemed municipal policy, even though his decision is subject to review and reversal by other city officials, because the reviewing officials defer in substantial part to the original decisionmaker. This Court has not directly addressed the issue. However, we believe that the various views developed regarding the contours of municipal liability compel the conclusion that the vesting of authority in a city employee to make decisions, even when not reviewable, does not by itself transmute all of the employee's decisions into municipal policy.

A.

The Lower Court's Opinion Is Inconsistent With The Results In *Polk County v. Dodson* and *City of Oklahoma City v. Tuttle* Where Employees Who Had Been Delegated The Authority To Make Decisions And Who Made Decisions Which Ended The Matters Decided Were Not Deemed Policymakers.

The lower court's opinion is inconsistent with the result in *Polk County v. Dodson*, 454 U.S. 312 (1981) and inconsistent with the result in *City of Oklahoma City v. Tuttle*, 471 U.S. 806 (1985).

The theory of the case below was succinctly stated as follows:

> "(1) if, according to a policy or custom established by a governing body, an official is delegated the authority, either directly or indirectly, to act on behalf of a governing body; and (2) if a decision made within the scope of the official's authority ends the matter, then the acts of the official may fairly be said to be those of the local governing body." *Praprotnik*, 798 F.2d at 1174.

The last condition is deemed met when a review process "defers in substantial part to the judgment of the original decisionmaker;" *id.*, 798 F.2d at 1175.

In *Polk County*, the basis of the plaintiff's claim against the local government was that the public defender, a county employee who had represented plaintiff, had withdrawn from representing him, causing him to be subjected to various constitutional deprivations. The Court held that plaintiff failed to state a claim because plaintiff's complaint failed to identify an unconstitutional policy pursuant to which an act causing injury occurred. However, if we employ the analysis of the court below, this result is error. The decision whether to withdraw from representing plaintiff was delegated to the assistant public defender; and the assistant public defender's decision ended the matter. There was no internal procedure of any kind, let alone

one which did not defer in substantial part to the assistant public defender's judgment, by which plaintiff could have obtained review of the assistant public defender's decision.

In *Tuttle* the city, by policy or custom, delegated to individual police officers the authority to act in the city's behalf in apprehending suspects. Officer Rotramel made a decision within the scope of his authority — he decided that he would use deadly force to apprehend the suspect — and that decision ended the matter of whether such force should be brought to bear in that case. Indeed, under the circumstances, Officer Rotramel's decision was the most final decision made by any employee in any of the Court's cases. There neither was nor could have been an appeal of his decision. Yet the Court held that liability could not be imposed upon the City on the basis of Rotramel's decision alone. Both of these cases are plainly irreconcilable with the opinion below.

B.

The Opinion Below Is Inconsistent With The Court's Pronouncements On Municipal Policy Because Hamsher Was Not Delegated The Authority To Make City Employment Policy, And He Did Not Make A Rule Of General Applicability.

The opinion below is inconsistent with the results reached in *Polk County* and in *Tuttle* because it is inconsistent with the principles that this Court has developed and applied to deciding issues of §1983 municipal liability.

Justice Brennan has developed the view that a policy is made where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 89 L.Ed.2d at 465. Justice Brennan's view recognizes that unconstitutional acts of even policymakers are not *ipso facto* municipal policy, for it is necessary "that the unconstitutional act was taken *pursuant* to a municipal policy rather than simply resulting from such a policy in a 'but for' sense." *Pembaur*, 89 L.Ed.2d at 464-465 n.11 (emphasis in original).[4]

What is critical to this analysis is identification of the "subject matter in question" or "activity". *Pembaur*, 89 L.Ed.2d at 465. This is well illustrated in footnote 12 of Justice Brennan's opinion which, as Judge Ross' dissent in the case below correctly points out, is directly applicable to the case at bar. According to footnote 12, the identification of the particular subject matter in question takes place at a level of abstraction considerably beyond that of an individual hiring or firing decision; rather, the subject matter in question is defined broadly as "county employment policy". An individual hiring or firing decision does not become local government policy merely because the local government gives a particular employee discretion to make that decision; rather, an individual employment decision is transmuted into government policy only where the government has "delegated its power to establish final employment policy" to the particular decisionmaker. *Pembaur*, 89 L.Ed.2d at 465 n.12.

In the case at bar, the court below deemed an individual transfer decision local government policy because the City of St. Louis gave Frank Hamsher discretion to transfer plaintiff. There is no evidence, however, that the City gave Hamsher the power to establish final employment policy for the City. Indeed, the Civil Service Commission reviewed plaintiff's many complaints regarding plaintiff's several supervisors and sustained plaintiff's appeals. Because the City did not delegate the authority to set final City employment policy to Hamsher, the court's opinion is inconsistent with the views set forth in Justice Brennan's opinions in *Tuttle* and *Pembaur*.

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[4] But see Justice Brennan's opinion in *Tuttle* where it is said that "[s]ome officials, of course, may occupy sufficiently high policy-making roles that any action they take under color of state law will be deemed official policy." *Tuttle*, 85 L.Ed.2d at 808 n.5 (Brennan, J., concurring).

A competing view of municipal liability is expressed in Part II of Chief Justice Rehnquist's opinion in *Tuttle*, and further developed in Justice Powell's dissent in *Pembaur*. Justice Powell's dissent in *Pembaur* identifies policy as limited to: (a) rules of general applicability established by official action; or (b) decisions of specific application adopted as the result of a formal process. *Pembaur*, 89 L.Ed.2d at 475-476 (Powell, J., dissenting).[7]

With respect to subpart (a) of Justice Powell's test, it is necessary to identify whose rules of general applicability are liability engendering, and although the answer may differ from government to government, and from rule to rule, the answer to that question is not difficult: the rules of those whom the applicable law vests with the authority to make rules of general applicability for the city. In the case at bar, it is clear that Frank Hamsher did not have the authority to make a personnel rule of general applicability for the City of St. Louis. It is a little more difficult to ascertain, pursuant to subpart (b) of the test, whose decisions adopted by a formal process are liability engendering. However, Justice Powell's discussion in *Pembaur* looks to *Owen v. City of Independence* and *City of Newport v. Facts Concerts, Inc.*, where the decisions were made by city councils, as examples, and his suggestion that had the elected prosecutor rendered his opinion in a formal and deliberate way (perhaps by an "opinion" letter), liability might have been imposed, provides a notion of what Justice Powell contemplated. It also gives an idea of what is not contemplated, and it seems clear that an individual transfer decision by a supervisor is beyond the pale. Thus, the opinion below is inconsistent with Chief Justice Rehnquist's opinion in *Tuttle* and with Justice Powell's opinion in *Pembaur*.

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[7] Justices Brennan, Blackmun and Marshall agree that policy is made under those circumstances. See *Pembaur*, op. cit., 89 L.Ed.2d 463-464.

C.

Liability Cannot Be Imposed On Cities On The Sole Basis That A Decision Has Been Made That Is Not Subject To Review Because Such Liability Is Inconsistent With Congress' Rejection Of Respondeat Superior.

Not only is the opinion below inconsistent with what the Court has decided and what the Court has said, it is at odds with the policy of Congress, and with common sense.

This Court carefully scrutinized the legislative history of §1983 in *Monell*, and concluded that Congress did not intend that municipal liability be based on a respondeat superior theory. That conclusion was derived from two considerations. First, the plain language of the statute: "[T]he fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend §1983 liability to attach where such causation was absent." *Monell*, 436 U.S. at 692. Second, the Court believed that Congress would have considered §1983 respondeat superior liability to be constitutionally repugnant, just as it thought the Sherman Amendment constitutionally repugnant, for it was believed that Congress could not impose a duty upon municipalities to keep the peace by the coercive mechanism of imposing liability for the failure to do so. *Monell*, 436 U.S. 693.

Both of these considerations suggest that the theory of the case below is incompatible with the intent of Congress. Hamsher's (A's) tort can become the City (B's) liability only if the City caused Hamsher to subject plaintiff to a tort. But there is nothing that the City (or any of its agents) did that caused Hamsher to inflict retribution upon plaintiff, any more than would a garbage collector who, entirely of his volition, and in response to his bigoted impulses, provided a higher level of services to the green people of the north side of a street than he provided to blue people on the south side of a street, be caused to do so by the city that employed him. Thus, the language of §1983 referring to "[e]very person who. . .cause to be subjected" would be wholly inapplicable. Liability must be based upon the language: "[e]very person who. . .shall subject." But while Hamsher, or our hypothetical garbage collector, would be any person, that language cannot be "easily read" such that either is the city, where nothing is involved but an individual decision by an individual supervisor or garbage collector.

Second, the insistence of the court below that a local government respond in damages for each of the constitutional torts committed by its employees where the local government does not provide a review mechanism comporting with a court's notion of what such a process should consist, runs afoul of the constitutional doctrine of the 1871 Congress. In *Monell*, the Court concluded that "creation of a federal law of respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional." *Monell*, 436 U.S. at 693. Congress thought the imposition of such an obligation beyond the power of Congress for it believed that Congress could not impose duties on state officers and agents as the imposition of such duties might impede them in the performance of their legitimate activities, *Monell*, 436 U.S. at 678. Congress further believed the imposition of damages for failure to perform a function was a coercive mechanism tantamount to the imposition of a duty. *Monell*, 436 U.S. at 679. Here, too, the lower court is attempting to impose a duty upon state instrumentalities: if you do not establish procedures for the review of your employees' decisions of the kind we deem appropriate, we shall make you pay for your delinquency. The court below will be unsuccessful in its effort, because it is simply impossible to establish the procedures the court below requires without crippling the conduct of government, because governments cannot subject all of their employees' decisions to appellate review processes that operate without according deference to their employees' decisions. But in the long run, as the verdicts are returned, it is not unlikely that the court's view would successfully "destroy the government of the States." *Monell,* 436 U.S. at 679.

A third consideration militating against adopting the lower court's theory is that the consequence of doing so would render Congress' act in rejecting respondeat superior close to meaningless. To be sure, the lower court's opinion does not by its terms adopt respondeat superior. Respondeat superior makes a corporation liable for all of the acts of its employees, i.e., it makes the corporation liable for those whose physical conduct in the performance of services to the corporation are subject to the control of the corporation. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts, §70 (5th Ed. 1984).

The court below makes liable a municipal corporation only for those acts of its employees that are not reviewable by a process that does not defer in substantial part to the decision of the original actor. But almost all acts of municipal employees will fall into that category. On any given day, employees of a large city make literally tens of thousands of deliberate choices of whether to follow a course of action among alternatives. An assistant city counselor decides whether he will make argument A rather than B in the brief that he is preparing; another city attorney decides to strike juror A rather than juror B from the panel; a sanitation worker chooses to collect garbage on the north side of the street rather than the south side of the street; the counter clerk decides that he will wait on citizen A rather than citizen B, when both arrive at his city office at the same time; the school teacher decides that he will teach spelling in the morning rather than the afternoon; the police officer determines how much force is necessary to effectuate a particular arrest; and on and on. In none of the cases is there an appeals process; in each of these cases the individual employee makes a choice among alternatives that is not subject to review. As an academic advocate of the view embodied in the decision below candidly admits, the "only way a city shall be allowed to limit its liability is to withdraw completely the police officers' [or other city employees'] power to arrest or search [or otherwise perform their functions]." Seng, *Municipal Liability For Police Misconduct*, 51 Miss. L. J. 1, 11 (1980). However, cities will not withdraw completely their employees' powers to act for they cannot. It is implausible that an 1871 Congress which repudiated respondeat superior would have countenanced such a result.

D.

A Policy Is Never Made By One Who Acts Contrary To Orders; A Policymaker Is One In Whom The Ultimate Authority To Make Decisions Is Placed By the Local Government's Fundamental Law.

A first approach to identifying whether a particular decisionmaker has made a policy is identification of the "activity" or "subject matter in question" by scrutinizing the facts to find all decisions that bear on the unconstitutional act. One would look to the most general statement of policy that had been made, which would normally be the one promulgated by the highest placed municipal decisionmaker who had made a decision pertaining to the matter. Something like this is suggested by Justice White in his concurring opinion in *Pembaur*, where he observes that "[w]here the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy", for if acts of employees contrary to local law were to expose the local government to liability, in such a circumstance, "it must be on the basis of *respondeat superior* and not because the officers' acts represents local policy." *Pembaur*, 89 L.Ed.2d at 467 (White, J., concurring). In other words, a decision contrary to orders is not policy. Thus, in a *Pembaur*-like situation, if the county prosecutor promulgated a policy that such search and seizures as the police conducted were proper, and an assistant prosecutor so advised, that would be county policy. If the prosecutor established a rule that such seizures were improper, and an assistant prosecutor nonetheless directed that such a search take place, there would not be county liability even though the assistant prosecutor's decision was final and not reviewed by the prosecutor. The harder case, however, is where the prosecutor does not establish any policy at all regarding the propriety of a particular search, and leaves the assistant to his own devices.

A suggestion as to the proper resolution is contained in Justice Brennan's opinion in *Pembaur* where he says that "if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board." *Pembaur*, 89 L.Ed.2d at 465 n.12. This suggests that the case we posed in which the prosecutor has not established any policy should be resolved by employment of a second approach: a person should not be deemed an "official responsible for establishing final policy with respect to the subject matter in question" unless he is the "ultimate authority" with respect to the subject matter in question. That is, if the decision causing constitutional injury is made by one who is not subject to the direction and control of any other city official, then the local government would be liable because the decision was made by a person with the ultimate authority to make such decisions on behalf of the local government. One must scrutinize the fundamental law of the local government, normally either a charter or state statutes, to ascertain where ultimate authority to make a particular decision is placed. Thus, the result in *Pembaur* is sustained, even if it is believed that the county officials did not follow standard operating procedure, for the county official whose decision caused the injury was not subject to the direction or control of the county's governing body. *Pembaur*, 89 L.Ed.2d at 460. At the same time, the results in *Polk County* and *Tuttle* are reaffirmed, because the public employees in both cases were subject to the control of higher officials (even though the decisions they made were final), and thus the employers were not possessed of the ultimate authority.

This ultimate authority elaboration has several virtues, in addition to its capacity to reconcile the cases. It is flexible, and flexibility is a very important consideration in view of the vast differences in the configurations of local government in the United States. In one city, the mayor may have the ultimate authority to decide a particular matter; in another city, the ultimate authority to decide that matter may be placed in the city council. In one county, all the affairs of the county and all of its employees are subject to the direction and control of the county governing body; in another county, authority is divided among several independently elected officials (for example, the prosecutor, recorder of deeds, collector of revenue) none of whom is subject to the direction and control of the county council or of the other officials. This approach would permit local structures of government to be accomodated by an inquiry as to where ultimate authority was placed in a particular local government.

This approach would also be fair. The burden of a judgment against a local government will, of course, be borne by the residents of the particular subdivision in the form of taxes. It is fair to require the taxpayers of Hamilton County to pay for the unconstitutional acts of a prosecutor whom they elected;[9] it is

unfair to require them to pay for the illegal acts of persons in whom they have not vested the ultimate authority to decide on a course of action, despite the fact that it is necessary to place "final" decision-making authority in low-level employees. In such cases, the "ultimate authority" analysis protects the taxpayer from the acts of those in whom they did not entrust authority. Indeed, *Monell* itself appears to recognize the correctness of such a result: "By our decision in *Rizzo v. Goode*, 423 U.S. 362, 46 L.Ed.2d 561, 96 S.Ct. 598 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support §1983 liability. See *id.*, at 370-371, 46 L.Ed.2d 561, 96 S.Ct. 598." *Monell*, 436 U.S. at 694 n.58. The harder case we posed above is thus resolved: where the prosecutor in the *Pembaur*-like situation has not made a policy, and his underling makes an unconstitutional decision, the county is not liable because the prosecutor, in whom the ultimate authority to make such a policy had been placed, did not make a policy. Lest there be a misunderstanding, let us hasten to add that the county would not avoid liability under this theory simply because there was no evidence of a written policy; if there was a persistent practice of the assistant prosecutors to make unconstitutional decisions, and this practice was known to the prosecutor, his tolerance of the custom is his policy, and his policy is the county's policy for which it might properly be held liable.

The view that we have urged — that at a minimum a decision cannot be a policy where the decision is contrary to an established policy made by one in a position superior to that of a decisionmaker — is consistent with both the language of §1983 and the constitutional theory of Congress. For a city does not cause its employees to subject others to torts when the employees violate rules, orders and decisions which they are bound to observe. Nor does such a construction require cities to establish a particular procedure for conducting their affairs. Moreover, the more comprehensive theory for assessing liability offered above for resolution of the "harder case" — that a decision is not city policy unless it is made by those in whom the ultimate authority is vested to make such a decision — is consistent with these considerations. For a city does not cause its employees to subject others to torts when the natural persons in whom ultimate decision-making authority to make its decisions is entrusted do not require the City's employees to commit torts, and the rights of states and their instrumentalities to order their internal policies as they see fit is properly respected.

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[9] It is likely that most officials who are entrusted with ultimate authority are elected officials, but certainly there are many such officials who are appointed. Nevertheless, it is fair to require the taxpayer to pay for injuries inflicted by even appointed officials in whom they have placed the ultimate authority to make decisions on their behalf.

E.

Hamsher's Decision Was Not A City Policy: If It Was Illicitly Motivated, It Was Contrary To The Charter; And Hamsher Did Not Have The Authority To Make Employment Policy.

Application of the principles developed above requires that the judgment below be reversed. There is not one whit of evidence that the City of St. Louis had a rule, written or otherwise, that employees making appeals to the City's Civil Service System should be punished. The case is based solely on the meager circumstantial evidence which the court of appeals thought sufficient to allow a rational jury to infer that Frank Hamsher transferred plaintiff because of plaintiff's appeal. Nor is there evidence that Hamsher engaged in the kind of formal process Justice Powell had in mind. Liability must be imposed, if at all, on the basis that Hamsher made a deliberate choice from among alternatives, and that Hamsher was the official responsible for establishing final policy with respect to the subject matter in question. Without a doubt, Hamsher made a deliberate choice among alternatives — he transferred plaintiff and he did not have to do so. But the important issue remains: was the decision as to whether or not plaintiff would be transferred final policy with respect to the subject matter in question?

If the analysis above is correct, investigation of this matter begins with a search for a policy adopted at a level "higher" than Hamsher that would determine whether Hamsher or others in his position had the discretion to transfer plaintiff because plaintiff made appeals to the Civil Service Commission. The City's Charter, adopted by vote of the residents of the City, and recognized as the City's "organic law", see *State ex rel. St. Louis Fire Fighters Association Local No. 73 v. Stemmler*, 479 S.W.2d 456, 457 (Mo. banc 1972), includes just such a policy.

Article XVIII of that Charter establishes a civil service system for the City. Under that system, all personnel decisions, including separation from employment, are to be made "on the sole basis of merit and fitness.' (J.A. 49). Employees may not be removed, demoted, or decreased in pay until they receive written notice, with the right to appeal, and after the completion of an investigation to insure that the decision was indeed made on the sole ground of merit and fitness (J.A. 55). Employees cannot be transferred, except where the transfer is for the benefit of the service (J.A. 54). A Civil Service Commission is created which has the authority and the duty to "consider and determine any matter involved in the administration of [the civil service] article and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the director or on appeal by any appointing authority, employee, or taxpayer of the city, or from any act of the director or of any appointing authority." (J.A. 63). Although there is nothing in the Charter that says, in so many words, that an appointing authority (such as Hamsher) is forbidden from punishing employees for filing appeals with the Civil Service Commission, it is impossible that such a decision could be thought to be made on the basis of merit and fitness. Moreover, it is surely implicit in any scheme that establishes such a liberal appeal process that employees cannot be punished for taking advantage of the process, for that would destroy the system it creates.[9] The City's Director of Personnel testified that he had the authority to prevent retaliatory transfers (R. 3-117). Thus, the policy of the City, as expressed in its Charter, forbids the kind of act Hamsher is supposed to have committed.

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[9] An analogy is found in cases that have held that a claim may be made under 42 U.S.C. §1981 for acts in retaliation for filing an EEOC

Though plaintiff's counsel claimed otherwise in his opening argument (R. 1-14), there was no evidence that the policy expressed in the Charter is a mere formality, belied by an actual practice to the contrary. In fact, the Civil Service Commission, which has the power and duty to adopt rules and recommend ordinances for the administration of the system (J.A. 50, 62), promulgated an elaborate set of rules for implementing the system (J.A. 85-103). Indeed, plaintiff himself used the system successfully several times. Thus, if Hamsher actually did transfer plaintiff because of the civil service appeals, he did so in violation of City policy as expressed in the Charter, and he did not have discretion to do so. Because the issue can be disposed of at this level, there is no need to consider the additional analysis offered above that limits the liability of the city to the acts of those vested with the ultimate authority to make decisions on behalf of the city. Suffice it to say, plaintiff would have no claim under that theory, for the ultimate authority to make such decisions is placed in the Civil Service Commission, insofar as the Commission is authorized to adopt rules to administer the system (J.A. 50-57, 62-64); and in the Commission, the Board of Aldermen, and the Mayor, insofar as the recommendation, the adoption, and the approval of ordinances is required (J.A. 62-63).

Policymakers speak for the city, and they speak for the city when they make policy. The answer to the first question presented by our petition is that the failure of a local government, such as the City of St. Loius, to establish an appeals procedure for the review of employees' decisions which does not defer in substantial part to the original decisionmaker's decision does not alone make the local government liable for the official's decisions, because employees are not policymakers merely because of the absence of such procedures. The trial court erred in denying the City's motions for directed verdict.

II.

The Verdict Exonerating Hamsher Is Inconsistent With The Verdict Returned Against The City.

A.

The City "Policy" Upon Which Liability Was Imposed Was Hamsher's Transfer Of Plaintiff.

Plaintiff's action was brought against Frank Hamsher, Charles Kindleberger and Deborah Patterson, in addition to the City of St. Louis. All of the individual defendants were exonerated by the jury's verdict; yet a verdict was returned against the City. Since the policy upon which City liability was predicated — Hamsher's decision to transfer plaintiff — and the act upon which plaintiff sought to impose individual liability upon Hamsher — his act transferring plaintiff — are distinct only analytically, it would seem to follow directly from the Court's holding in *City of Los Angeles v. Heller,* 89 L.Ed.2d 806, 475 U.S. ____ (1986), that the verdicts are incompatible and cannot stand. In *Heller* the Court upheld the trial court's dismissal of a §1983 action against the City of Los Angeles after the jury returned a verdict in favor of the individual officer who was alleged to have inflicted a constitutional injury on the plaintiff.[10]

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claim, for Section 1981 would become meaningless if an employer could punish an employee for attempting to enforce his rights under the statute. *Goff v. Continental Oil Co.,* 678 F.2d 593, 598 (5th Cir. 1982).

[10] *Heller* would not be applicable where the individual defendant might be thought to have been exonerated because he had established his immunity to the action. For example, in *Tuttle,* the jury exonerated Officer Rotramel, having been given a qualified immunity instruction, *Tuttle,* op.cit., 85 L.Ed.2d 791-792; and in *Pembaur,* the

The court below distinguished *Heller* on the basis that other city employees (Nash and Killen), who had not been named as defendants, were the persons who "effected city policy in laying Praprotnik off and thereby brought to fruition Praprotnik's ultimate injury." *Praprotnik,* 798 F.2d at 1173 n.3.[11] The jury's verdict exonerating Hamsher and the other individual defendants was attributed by the lower court to an erroneous instruction that liability might be imposed upon them only if they were "personally involved" in the layoff. *Id.* There was, in fact, an Instruction (No. 16) that informed the jury that an individual not be held liable under §1983 unless "he was personally involved in causing the deprivation of a constitutional right or he either has or is charged with actual knowledge that his subordinates are causing deprivations of constitutional rights." (J.A. 114). If the court below was referring to instruction 16, it was mistaken in its belief that the instruction made a plaintiff's verdict against the individual defendants contingent upon a finding that Hamsher and the others had to be personally involved in the layoff. There was another instruction (No. 29) that required a finding that Hamsher was personally involved in the layoff, but that instruction was the verdict director on the due process claim, and had nothing to do with the First Amendment claim (J.A. 120). Beyond this, Instruction No. 22, plaintiff's verdict director on the First Amendment claim, instructed the jury that it might find for plaintiff and against the individual defendants,

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prosecutor was not made a party because plaintiff believed he was absolutely immune. *Pembaur,* op.cit., 89 L.Ed.2d at 459 n.2. In the case now before this Court, a kind of qualified immunity instruction was given to the jury, but it involved only the Due Process claim and did not purport to be applicable to the First Amendment claim, which is the subject of the petition for certiorari. (J.A. 123)

[11] There was no evidence that either Nash or Killen effectuated plaintiff's layoff for an improper reason, and the opinion below does not pretend that there was.

if the defendants "were personally involved in causing plaintiff's transfer and/or layoff" (J.A. 118).[12]

Although we agree with the court's criticism that the "and/or" device contained in Instruction No. 22 is inelegant, *Praprotnik,* op cit., 798 F.2d at 1173 n.3, the phrase is comprehensible and it clearly allows liability to be imposed if the jury found that the individuals had been involved in the transfer. Indeed, by phrasing the instruction in and/or terms and referring to both the transfer and the layoff, the instruction allowed the jury to return a verdict against Hamsher under any of three theories, a device that optimized the opportunity for a verdict against Hamsher. In any case, the theory upon which the court of appeals settled was that the unconstitutionally motivated act was the transfer. It was never disputed that Hamsher was not only personally involved in the transfer, but instigated that action. Therefore, it is not plausible that the verdict exonerating Hamsher was a consequence of the jury's belief that he could not be held liable because he was not personally involved in the layoff itself; rather, the most plausible interpretation of the verdict is that the jury did not believe: a) that Hamsher was improperly motivated; or b) his improper motivation was not the factual ("but-for") cause of either the transfer or layoff. Those propositions formed the second element that the verdict director required the jury to find (J.A. 118).

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[12] Instruction 22 (J.A. 118-119), the verdict director on the First Amendment claim, was badly bungled. The confusion that pervades the entire instruction begins with the misjudgment that one verdict director could embrace all four defendants, without distinguishing the findings necessary to sustain verdicts against each, and that the verdict director could embrace two discrete injuries — the transfer and the layoff — which were temporally remote, and which involved different actors. The error made in the concept of the instruction continued in its execution. The first part of the instruction requires a plaintiff's verdict if the jury finds that all of the six elements set forth are established ("Your verdict must be for the plaintiff...if..."). However, the second part of the instruction permits the jury, if it believes plaintiff to have established the six elements above, to ignore its announced duty to return a verdict for the plaintiff, and to consider three additional "defenses." If the jury believes that those three elements are true, it is commanded to return a verdict for the defendants. Beyond this, certain of the second three elements are simply incompatible with certain of the first six elements: a rational mind could not simultaneously accept the truth of both propositions. Moreover, at least one of the elements (that which was aimed at the City), was a misstatement of the law. The court below was manifestly dissatisfied with the instructions and believed that there was error committed. *Praprotnik,* 798 F.2d at 1173 n.3. It would have been more appropriate for the court to have deemed the instruction plain error (there was no objection), and reversed, rather than to reach as far as it did to impose a semblance of logic on the case. This is particularly so since Instruction No. 27 (J.A. 125) was also erroneous. See *Memphis Community School District v. Strachura,* 477 U.S. ____, 91 L.Ed.2d 249 (1986).

Thus, the judgment below can be saved only if the reliance of the court below upon the remoteness of the layoff from the transfer can sustain both the verdict against the City and the verdict in favor of Hamsher. That is, can an individual public employee escape liability because an injury is unforseeable, even though a local government is made to suffer the imposition of liability for an injury equally unforseeable?

Section 1983, it has often been said, "creates a species of tort liability...". *Imbler v. Pachtman,* 424 U.S. 409, 417 (1976). However, the Congress that created the tort did not see fit to adumbrate all of the elements of the new tort, nor to establish a procedure by which the new action might be litigated to judgment. Congress did, however, state that the new tort was "subject to the same rights of appeal, review upon error, and other remedies provided in like cases...", by reference to what is now codified as 42 U.S.C. §1988, adopted as part of the Civil Rights Act of 1866. This required the courts to exercise their newly established jurisdiction in civil rights cases in conformity with federal law to the extent that federal law was suitable, and with reference to the common law as modified by state law where federal law was deficient. *Moor v. County of Alameda,* 411 U.S. 693, 705-706 n.19 (1973). In conformity with this charge, the Court has adopted common law tort principles where the interests protected by traditional tort law closely parallel the interests protected by the particular constitutional right; and the Court has adapted and modified common law rules where the interests protected by traditional law do not include the particular constitutional right. *Carey v. Piphus,* 435 U.S. 247, 258 (1978).

B.

§1983 Requires Factual Causation.

The Court's most significant causation case concerning a constitutional tort is *Mt. Healthy City School Dist. Board of Educ. v. Doyle,* 429 U.S. 274 (1977). *Mt. Healthy* is a particularly interesting case for it involved the liability of a local government for the commission of a constitutional tort, although jurisdiction was purported to be based upon 28 U.S.C. §1331, rather than upon §1983. This distinction is not an important one, however. The case was decided before *Monell,* and defendant school board did not raise the issue of municipal immunity until after the board had filed its reply brief in this Court, which declined to rule upon the tardy contention. There can be little doubt that the action would be brought pursuant to §1983, if it were brought today, and properly so. Therefore, it is fitting that we consider *Mt. Healthy,* for all intents and purposes, a §1983 action against a local government.

Mt. Healthy concerned plaintiff school teacher's claim that the local government, which had employed him, chose not to renew his contract in retaliation for the teacher's exercise of his First Amendment rights. The lower court found that plaintiff's rights had been violated because the exercise of the teacher's First Amendment rights had played a substantial part in the board's determination not to renew the contract. This Court reversed, holding that such a finding was insufficient to support the imposition of liability against the local government. It was necessary, the Court believed, to "formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." *Mt. Healthy,* 429 U.S. at 286. The Court found that the standard the trial court employed - a showing that the conduct was constitutionally protected and that the conduct was a substantial factor in the adverse employment decision - was an essential finding but not a sufficient one. It was necessary for the trial court to "have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.,* 429 U.S. at 287. This Court subsequently, in another case brought by an employee against a local government, referred to *Mt. Healthy* as employing a "but for" test. *Givhan v. Western Line Consolid. Sch. Dist.,* 439 U.S. 410, 417 (1979).[11] In declaring the "but for" test of causation, the Court applied traditional common law tort principles, which forbid the imposition of liability where the defendant does not, as a matter of fact, cause injury to plaintiff.

C.

§1983 Requires Proximate Causation With Respect To Both Cities And Individuals.

Tort law, however, requires more than factual causation as a condition of liability, for "the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." Keeton, et al., Prosser and Keeton on Torts, *op. cit.,* §41. Because "any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the

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[11] "And while the District Court found that petitioner's 'criticism' was the 'primary' reason for the School District's failure to rehire her, it did not find that she would have been rehired *but for* her criticism." *Givhan, op. cit.,* 439 U.S. 417 (emphasis in the original).

court's with endless litigation' . . . legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." *Id.*

The most prominent such limitation is what is generally called "proximate causation" and proximate causation has frequently been expressed in terms of "foreseeable risks"; i.e., defendant's act is not deemed to be the proximate cause of plaintiff's injury where the defendants could not have reasonably foreseen that plaintiff would be injured as a consequence of defendant's act. *Id.* §§42 and 43. Indeed, this Court's decision in *Milwaukee and St. P. Ry Co. v. Kellogg,* 94 U.S. 469, 475 (1877), where the Court described proximate causation as requiring that it "appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances" has been recognized as the leading American case. Keeton, *et al.,* Prosser and Keeton on Torts, *op. cit.,* §43. More than this, the Court recognized that not "even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury". *Kellogg,* op. cit., 94 U.S. at 475.

The Court has made it plain that proximate causation, just as factual or but for causation, is required in a §1983 case brought against individuals. There is dictum to that effect in *Monroe v. Pape,* 365 U.S. 167, 187 (1961) ("Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.") That dictum came to life in the holding in *Martinez v. California,* 444 U.S. 277 (1980), an action brought against parole officers by the survivors of a girl murdered by a parolee. The Court held that plaintiff's pleading failed to state a claim for relief pursuant to §1983, for "appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." *Id.,* 444 U.S. at 285.

Do considerations of proximate causation and foreseeability similarly limit the liability of local governments for injuries caused by their policies? Certainly the plain language of §1983 fails to distinguish between the principles of causation that are applied to cities and those that are applied to individuals. Nor is there anything in *Monell* that suggests that traditional tort principles of forseeability should be abandoned where local governments are concerned. Moreover, Congress' rejection of respondeat superior liability for municipal corporations evinces a belief, at least to a limited extent, that cities should not be held liable on the basis of but-for causation, without inquiry as to the proximate cause issue, since but for the employment by the city of the tortfeasor, the victim will not be injured. Support, if any, for the view that cities are liable for the unforseeable consequences of their policies, must come from *Owen v. City of Independence,* 445 U.S. 622 (1980), where the Court held that local governments are not protected by the qualified immunity doctrine that protects individual defendants. There is a way of articulating *Owen* so that it seems analagous to the issue we are discussing here: If *Owen* holds that local governments are not immune from liability for acts that they cannot reasonably foresee to be unconstitutional, does it follow that they ought not be shielded from liability for the damages that their policies cause, merely because they could not reasonably foresee that an individual would be damaged as a consequence of those policies, unconstitutional or not? Indeed, the dissenting justices feared that the effect of the Court's opinion was to impose strict liability upon cities. *Owen,* op. cit. 445 U.S. at 658 (Powell, J., dissenting).

There are several reasons why such a conclusion does not follow. First, in *Owen* the Court was concerned with the issue of immunity, which presumes that the defendant caused plaintiff's injury, factually and proximately. Second, by withholding qualified immunity from cities, the Court did nothing more than hold that cities would not be exonerated because they could not foresee changes in the law that would convert public policies that produced their intended results into constitutional torts. That is far different, and much more fair, than imposing liability upon cities for damages their policies cause, when not only is it unforseeable that the policies would be declared unconstitutional, but it is unforseeable that the policies would produce the results that injured plaintiff.[14]

Third, any ambiguity about the Court's views was clarified in the opinions in *Oklahoma City v. Tuttle, supra,* 471 U.S. 808. Chief Justice Rehnquist, in his opinion announcing the judgment of the court, made it plain that more than but-for causation is required, *Tuttle,* 471 U.S. at 822-823; and Justice Brennan, the author of the Court's opinion in *Owens,* likewise made plain that something more than but-for causation is required. *Tuttle,* 471 U.S. at 822-823 n.9. (Brennan, J., concurring). See also Justice O'Connor's dissenting opinion on behalf of four Justices in *City of Springfield v. Kibbe,* 55 U.S.L.W. 4239, 4242 (1987), where the Court's cases are summarized as follows:

> Given the importance, under §1983, of distinguishing between direct and vicarious liability, the Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. See e.g., Oklahoma City v. Tuttle, 471 U.S., at 824-825 n.8 (requiring "affirmative link" between municipal policy and constitutional violation); Polk County v. Dodson, 454 U.S. 312 (1981) (municipal policy must be "moving force" behind constitutional deprivation). In

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[14] In other words, a city might have a policy that is later declared unconstitutional. Qualified immunity, under *Owen,* does not protect the City. However, if the policy had caused a result that was completely unpredictable and unintended, the City should not be held liable, not because it is immune, but because the policy is not the legal (proximate) cause of the unforseeable result.

Monell itself, the policy at issue commanded the deprivation of constitutional rights.

The proximate cause limitation evidenced in those opinions is incompatible with any attempt to use *Owen* as authority for a theory of strict §1983 liability for municipal corporations.

Finally, strict §1983 liability for municipal corporations must be rejected on the basis of the legislative history. In the course of the Court's careful examination of that history in *Monell,* the Court concluded that Congress had rejected the proposition that the Civil Rights Act of 1871, of which §1983 was a section, should embrace an insurance scheme. *Monell,* op. cit., 436 U.S. 694. Imposition of strict liability cannot be viewed as anything other than the creation of a mutual insurance scheme.

Thus, for all of these reasons, considerations of proximate cause and forseeability are as equally applicable to municipal corporations as they are to individuals.

D.

The Consequences Of Plaintiff's Transfer Were Equally Forseeable To Frank Hamsher, City Policymaker, As To Frank Hamsher, Individual Actor.

Acceptance of the proposition that cities, no less than individuals, cannot be held liable for the unforseeable consequences of their conduct, requires reversal of the judgment below. Demonstration that this is so requires, first of all, restoration of the level playing field that was upset by the court below. Realizing that there is an insurmountable bar to finding a reasonable connection between Hamsher's supposed illicitly motivated decision to transfer plaintiff, and the layoff of plaintiff 20 months later by other persons, the court below magically advanced plaintiff's date of discharge by the full span of 20 months, by deeming the transfer a constructive discharge because of the odius nature of plaintiff's new duties. *Praprotnik, op. cit.,* 798 F.2d at 1176.

There are several severe problems with the technique, most prominently the failure to explain why plaintiff has been fighting so vigorously to return to the assignment that is supposedly so detestable. Such considerations notwithstanding, if plaintiff's transfer is deemed a constructive discharge, so that Hamsher's supposed unconstitutional behavior was the more immediate cause of plaintiff's injury, the lower court's rationalization of the jury's verdict exonerating Hamsher on the theory that others directly caused plaintiff's layoff is both illogical and inconsistent. Beside the fact that the jury was specifically instructed that Hamsher was liable if he caused the layoff and the transfer, or liable if he caused the layoff or the transfer (J.A. 118), reason demands that if the conditions of the transfer were such as to constitute a constructive discharge, the issue of both factual and legal causation must be considered in terms, respectively, of: a) whether, but for Hamsher's improper motivation, plaintiff would have suffered the constructive discharge; and b) whether, looking at the matter from Hamsher's viewpoint, it was reasonably foreseeable that his decision to transfer plaintiff would place plaintiff in such a detestable position that plaintiff would suffer the damages attendant to a constructive discharge. Or, if we discount the constructive discharge theory and focus on the actual layoff, the issues become: a) whether, but for Hamsher's improper motivation, plaintiff would have suffered the layoff and the damages attendant to that act; and b) whether, looking at the matter from Hamsher's viewpoint, it was reasonably foreseeable that his decision to transfer plaintiff would place him in a position where he would be laid off and suffer the damages attendant to that act.

If the viewpoint urged above - that identical principles of both factual and proximate causation are used in considering the liability of both Hamsher, the natural person, and the City of St. Louis, the artificial person - then either analysis might be employed without violence to reason. What cannot be done logically, however, is what the court of appeals did: consider the issue of factual causation in terms of the purported constructive discharge, and consider the issue of proximate causation in terms of the layoff. Imagine a baseball player, having attempted to advance from first base to third, and facing the umpire's call that he had failed to touch second base, and that he had also failed to beat the tag at third, defending himself by insisting that he had beaten the throw at second, and had touched third base. We would accuse him of playing a shell game. That is what the court below did.

If we consider the scenario that centers on the constructive discharge, factual causation requires that plaintiff would not have been transferred but for Hamsher's illicit motivation. Since there was no dispute but that the transfer was Hamsher's decision, a finding against plaintiff would be predicated on a finding that Hamsher was not illicitly motivated. If Hamsher was not so motivated, both Hamsher and the City must be exonerated. On the other hand, if there was factual causation, there is a proximate cause issue that may be posed as follows: was it forseeable that plaintiff's new assignment would be so odius to constitute a constructive discharge. There was no evidence that it was; more important, however, it was equally forseeable or unforseeable, to Frank Hamsher, individual defendant, as it was to Frank Hamsher, city policymaker.

It is no different if we follow the second scenario set forth above, which centers on the layoff. Once again, there is no dispute that plaintiff would not have been laid off but for his transfer; thus, any finding for Hamsher on the factual causation issue must be predicated on the jury's belief that he was not improperly motivated. And once again, if Frank Hamsher, individual defendant, was not improperly motivated, neither was Frank Hamsher, city policymaker. Turning to the proximate cause issue, not even the court below hinted that there was any evidence that Hamsher could have forseen the ultimate layoff. But, at the risk of redundancy, even if it was forseeable, it was equally forseeable to Hamsher in his guise of city policymaker, as it was to him as an individual actor.

Before leaving this question, we acknowledge a distinction between this case and *Heller*. The trial in *Heller* was a bifurcated one, and the finding exonerating the individuals defendants was held to preclude the possibility of a jury subsequently returning a verdict against the city that would be consistent with its earlier verdict exonerating the particular employees involved. Here, the trial was not bifurcated, and verdicts were returned against the City and in favor of the individual defendants. Plaintiff did not appeal the verdicts in favor of the individual defendants, and the judgments in their favor are now final. Hence, the logic that applied in *Heller* is equally applicable here, although the circumstance is somewhat different: the final judgment in favor of the defendants who were alleged to have inflicted a constitutional injury upon plaintiff, make it inconceivable that an award of damages could be properly imposed upon the city whose policy they were alleged to have made and effectuated. Thus, the second question presented by our petition is answered: the principles of causation applicable to official and local governments pursuant to §1983 do not differ such that a judgment may be rendered against a local government despite the return of the verdict exonerating the individual employee who was alleged to have promulgated the unconstitutional policy and acted pursuant to the policy. The jury's verdict against the City of St. Louis here was illogical.[15]

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[15] It is worth observing that even where respondeat superior is applied the rule is that the master cannot be held liable where a verdict has been returned or a judgment has been entered in favor of the employee who was alleged to have acted wrongfully. See, 53 AmJur 2d, Master and Servant, §406; Annot. 78 ALR 365; and the cases cited in both articles.

CONCLUSION

The policy of the Congress which adopted §1983 was one of "opposition to punishing innocent taxpayers and bankrupting local governments . . .". *City of Newport v. Facts Concerts, Inc., supra,* 453 U.S. at 266. Innocent taxpayers have been punished by the judgment of the district court, and local governments will be bankrupted by the theory that the court of appeals employed to sustain that judgment. The judgment should be vacated, and remanded for entry of judgment in favor of the City of St. Louis because there was no evidence that a city policy caused injury to plaintiff, and because any judgment against the City of St. Louis would be incompatible with the final judgment entered in favor of Frank Hamsher and the other individual defendants.

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RESPONDENT'S

BRIEF

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No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,
Petitioner,
v.
JAMES H. PRAPROTNIK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

(1) Was the jury correctly instructed regarding the scope of municipal liability under Monell v. New York City Department of Social Services, 436 U.S. 658 (1978)?

(2) Was there sufficient evidence to support the jury verdict imposing liability on the defendant city?

(3) Was the jury's verdict against the defendant city inconsistent with its verdict in favor of the three individual defendants?

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STATEMENT OF THE FACTS

Respondent James Praprotnik, a licensed architect, was originally hired by the City of St. Louis in 1968. (Tr. 1:25-26). During the decade that followed respondent rose rapidly through the ranks of civil service employees, repeatedly rated as "superior" by his supervisors, and awarded double step increases in his salary. (Tr.1:37-43, 49-51). By 1980 Praprotnik was the Director of Urban Design in the city's Community Development Staff; in that management position he supervised a staff of architects and other professionals, (Tr. 1:30-31, 2:174, 3:144), and met and worked directly with city officials at the highest levels. Respondent's outstanding abilities have never been in dispute in this litigation; on the contrary, the city attorney insisted on stipulating to respondent's abilities, and repeatedly objected to the introduction of any further evidence on the subject. (Tr. 2:93, 140-41.)

Despite respondent's unquestioned abilities, there occurred in the spring of 1980 a drastic change in the manner in which St. Louis' highest ranking officials treated Praprotnik. During a 44 month period from April 1980 until December 1983 Praprotnik was repeatedly suspended and reprimanded, and given "inadequate" ratings. In April 1982, Praprotnik was transferred to an essentially clerical position on the staff of the Heritage and Urban Design Commission, and respondent's own position at CDA was given to one of his subordinates. Shortly after Praprotnik was transferred, HUD officials began a series of efforts

to lay him off on the ground that he was overqualified for his new position. On December 23, 1983, respondent was notified that he was being laid off effective December 30. (Tr. 1:84, 85, 2:9-11). The existence of this 4 year pattern of adverse personnel actions was uncontested; as the city correctly observed, "[w]hat was hotly disputed at trial was the state of mind of the ... City officials"[1] responsible for those actions.

Respondent alleged, and the jury concluded, that respondent's transfer and layoff were motivated by a desire to retaliate against him for certain actions protected by the First Amendment. The city has never denied that the actions which allegedly triggered the retaliation were protected by the First Amendment.

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[1] Id., pp. 17, 30-38.

In the court of appeals the city argued there was insufficient evidence to support a finding of any illicit retaliatory motive,[2] but the city chose not to seek review of that factual issue by this Court. The questions presented by the petition concern whether the city can be held liable for any unconstitutional purposes which may have motivated respondent's superiors.

(1) Respondent's Constitutionally Protected Conduct

The series of events which culminated in respondent's dismissal began with a controversy regarding whether the Director of the Community Development Agency could require prior approval whenever an agency employee wished to engage in any after-hours employment. A

pre-existing city-wide personnel practice required all municipal employees to fill out a form disclosing any outside employment; an architect who had private clients was obligated simply to state that he or she was "self employed." (Tr. 2:36-37, 118, 122). Beginning around 1978, however, CDA Director Donald Spaid began to insist that any professional employee, such as an architect, also obtain prior agency approval of every specific client for whom that employee proposed to do any work. (Tr. 2:37-38, 139). Respondent Praprotnik and other CDA employees objected to this new requirement on two grounds. (Tr. 2:30, 102, 3:217-18). First, they insisted that any such requirement be put in writing; the CDA Director for unexplained reasons adamantly refused to do so. (Tr. 3:235; cf Tr. 2:103, 118, 140). Second, respondent and other employees objected that the prior approval requirement was an unwarranted intrusion on their privacy and personal conduct. (Tr. 2:34, 3:217-18).

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[2] Brief for Defendant-Appellant City of St. Louis, No. 85-1145-EM (8th Cir.) p. 3.

By the spring of 1980 this controversy had been festering for two years. On April 8, 1980, the agency directed respondent to submit a written list of every person for whom he had done any architectural work since November, 1978. (Tr. 2:34). No other agency employee had ever been required to submit such a written list. (Tr. 2:34-35, 3:235-36). The statement submitted by respondent listed four small projects for personal friends and acquaintances, such as designing a room addition for his father-in-law. (Exhibits I-1, I-3). CDA officials never suggested there was anything improper in any of these

projects, or that any of them involved any conflict of interest. Nevertheless, on April 29, 1980, the agency suspended respondent for two weeks without pay, alleging that he had failed to obtain the required prior approval for one or more of the projects. (Tr. 1:46, 2:31, 3:216). Respondent insisted that he had indeed sought and obtained such advance approval. (Tr. 1:48, 2:32, 37, 39).

Respondent appealed his suspension to the city Civil Service Commission. Respondent and his superiors gave conflicting testimony before the Commission regarding whether the four projects had been disclosed and approved in advance. The Commission evidently chose to credit respondent's testimony; the Commission found no violation of the CDA prior approval policy, reversed respondent's suspension and awarded him backpay. (PX 25; Tr. 1:47, 3:220). The Commission criticized respondent only for failure to seek a definitive explanation of the CDA disclosure and approval policy. (Id.)

Both CDA Director Spaid, and Charles Kindelberger, the CDA Director of Urban Design, were angered by the appeal and by respondent's testimony. Respondent testified at trial that Kindelberger had warned him of Spaid's hostility.[3] Kindelberger himself conceded that both he and Director Spaid were angered by

what had occurred during the Civil Service Commission appeal:

"Q. Did Mr. Spaid say something to the effect that he was down on Praprotnik?

A. [Kindelberger] That sounds right.

Q. And that he felt he had not been honest, had not testified honestly at the Civil Service Commission, or words to that effect?

A. I don't know if Mr. Spaid said it, but I know I felt it at the time.

Q. That's what you felt that at the time?

A. Yeah.

Q. So that you were then concerned, too, because the ruling had come out against you; hadn't it?

A. Well, I didn't agree with the ruling."

(Tr. 3:237). Kindelberger made that reference to the disputed Civil Service Commission appeal and testimony when Praprotnik inquired why CDA subsequently attempted to reduce his salary. (Tr. 1:54).

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[3] Tr. 1:54-55:

"Q ... What did Mr. Kindelberger say to you about that?

A. [Respondent] At the time, it was that 'the director, Mr. Spaid, is very down on you.' That was his exact words.

Q. Did he tell you why he was down on you?

A. He stated that I had lied before the Commission, the Civil Service Commission".

The second incident also involved high level umbrage over testimony given by respondent. In the fall of 1981 the city was considering acquiring a sculpture by the controversial modern sculptor Richard Serra. Acquisition of the sculpture was strongly favored by the Mayor and by some influential private citizens, including Emily Pulitzer, the wife of the owner of the St. Louis Post Dispatch. (Tr. 3:180, 250). The Heritage and Urban Design Commission called respondent to testify about the proposal. (Tr. 2:4, 2:89). In his testimony respondent disclosed that, contrary to the representations of the sculpture's proponents, the sculpture at issue had been offered to and rejected by an earlier city administration. (Tr. 2:89). Respondent

also revealed that placement of the sculpture would require demolition of structures recently erected by the city at a cost of $250,000. (Tr. 2:5).

These disclosures triggered what one witness described as a "flap" within CDA, where respondent then worked. (Tr. 2:95). According to respondent he was admonished by Director Hamsher that that information should have been kept secret from HUD:

> Q. ... Now, after you testified before the Commission, did you have any conversation with Mr Hamsher?
>
> A. Yes. I was called into the office immediately the following morning. And together with Mr. Hamsher and also Mr. Kindelberger, was told that certain information that I had stated at the Commission meeting that I should have 'muffed it.'
>
> Q. You shouldn't have.
>
> A. I should have conceal it, you know, from them -- from exposure to the Commission.

(Tr. 2:4-5). The mayor's staff was present when respondent testified before the Commission, (Tr. 2:90), and there was some indication that the Mayor himself was displeased by the disclosures which respondent had made. (Tr. 3:250). Respondent suggested at trial that the hostile reaction to his testimony regarding the Serra sculpture was rooted in part in lingering anger over his Civil Service Commission testimony. (Tr. 2:5; 4:29). A CDA official subsequently admitted giving respondent a lower job performance evaluation because of the Serra sculpture incident. (Tr. 3:52).

(2) The Adverse Personnel Actions, 1980-83

Because the incidents leading to respondent's layoff spanned almost four years, and because respondent was as of 1980 a senior civil servant, a large

St. Louis Officials Involved in Actions Against Respondent Praprotnik

Agency	Official
Board of Estimate and Apportionment	Mayor Schoemehl
	Board of Alderman President Thomas Zych
	Comptroller Paul Berra
Mayor's Office	Frank Hamsher, Deputy Director of Development (after June, 1982)
	John Temporiti, Administrative Assistant to the Mayor
	William Lynn Edwards, Executive Director of Development
Department of Personnel	Director of Personnel William Duffe
Division of the Budget	City Budget Director Jack Weber
Community Development Agency	Director Donald Spaid (until April, 1981)
	Director Frank Hamsher (April, 1981 to June, 1982)
	Director Deborah Patterson (after June, 1982)
	Charles Kindelberger; Director of Urban Design
	Alvin J. Karetski, Deputy City Planning Director
Heritage and Urban Design Commission	Commissioner Henry Jackson (until February, 1983)
	Commissioner Rob Killen (after February, 1983)
Department of Public Safety	Director Thomas Nash

number of high level city officials participated in the various adverse actions of which respondent complained at trial. We set forth on the opposite page a list of the 16 officials involved, together with the office or agency in which they served. That list includes the city's three highest elected officials, among them the Mayor, eight agency directors or commissioners, and three members of the Mayor's personal staff. Director Nash was also a member of Mayor Schoemehl's cabinet. (Tr. 1:78). Among these 16 individuals, however, only three were named defendants when the case came to trial; the city successfully opposed joinder of several additional defendants, including the Mayor,[4] and former Commissioner Jackson had left the state and could not be served. (J. App. 2, N.R. 4,

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[4] See J. App. 5, 22-23.

5). The fact that many of the allegedly responsible officials were not among the named defendants is of considerable importance in understanding the jury's verdict and the issues on appeal.

Respondent Praprotnik's difficulties began shortly after he testified before the Civil Service Commission. Earlier, in April 1980, respondent had received his regular annual performance evaluation; respondent was rated "good" and recommended for a two step salary increase. (Tr. 2:42, 3:97; PX 18). Subsequently, however, Director Spaid ordered that respondent be given a new interim rating. (Tr. 3:101, 226). As a result of this special October 1980 rating, CDA proposed to reduce respondent's salary by two steps. (Tr. 1:54, 2:43). Defendant Kindelberger admitted that the disputed civil service appeal

had been discussed when Praprotnik was re-rated in October 1980. (Tr. 3:236-37). There was conflicting evidence regarding which official was responsible for the salary reduction. The actual directive was signed by defendant Kindelberger, the CDA Director of Urban Design. (DX J-2). At the trial, however, Kindelberger insisted that Director Spaid personally had ordered the salary reduction.[5] Respondent appealed the salary reduction to the Department of Personnel; Personnel Director Duffe approved a salary cut, but limited the reduction to a single step. (Tr. 3:104)

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[5] Tr. 3:226:

"Q. Did Mr. Spaid direct you to reduce him by two steps?
A. [Kindelberger) Yes, he did.
Q. Did he state why?
A. Well, I think he just -- I don't remember his specific concerns or the specific working but he just said that was the way it was going to be."

On October 30, 1980, the Civil Service Commission issued its order overturning respondent's two week suspension; although the Commission found no violation of CDA policies, the Commission authorized CDA to reprimand respondent "for his failure to secure a clear understanding" of what those policies were. (Tr. 3:221). On January 13, 1981, defendant Kindelberger issued to respondent a written reprimand "for your having entered into consulting arrangements over the last several years without proper authority". (Tr. 3:238). This was precisely the allegation which the Civil Service Commission had refused to sustain. Kindelberger admitted at trial that the substance of the reprimand "was not factually correct." (Tr. 3:238).

During the 18 months following the civil service appeal, there was a substantial reduction in respondent's authority and responsibility at CDA. Two-thirds of the employees in the section supervised by respondent were either shifted, along with their jobs, to other units, or were laid off. (Tr. 1:57-58, 3:157). Respondent was frequently excluded from meetings of other management officials. (Tr. 1:57, 2:141). Several of respondent's colleagues regarded these developments as being directed at respondent personally. (Tr. 2:141, 3:4-5). Respondent submitted to Director Hamsher a written appeal regarding this reorganization of responsibilities, but Hamsher never responded. (Tr. 1:58). There was some dispute regarding which senior city officials were responsible for this curtailment of respondent's authority and work; defendant Kindelberger, for example, testified he could not recall whether or not he had advocated any of these changes. (Tr. 3:225).

In October 1981, respondent was again subject to an annual performance evaluation. Prior to 1980 respondent had generally been rated superior or "good" and been awarded a raise. (Tr. 1:37-43). In October 1981, however, respondent was rated only "adequate" overall, and was denied any raise; for the first time in his 13 years at CDA respondent was rated "inadequate" on one part of his evaluation. (Tr. 1:64-65). Respondent appealed the evaluation to the Department of Personnel. While that appeal was pending, defendant Kindelberger wrote a memorandum urging that a critical portion of Praprotnik's personnel records be

deliberately withheld from his lawyer. (Tr. 2:58, 106; 3:228-31, 252-53). One of the supervisors who rated respondent admitted having based his evaluation in part on the fact that Director Hamsher was still angry over the Serra sculpture incident. (Tr. 2:4-6, 3:44-45). In discussions with the Department of Personnel, the two CDA supervisors who had evaluated respondent admitted having improperly colluded in preparing their assessments (Tr. 2:109, 124, 125). The Department of Personnel directed that the respondent's "inadequate" rating be raised to "adequate", and that respondent's overall performance be reevaluated by CDA. (Tr. 2:105-09, 3:48). CDA, however, never gave respondent the mandated reevaluation; Alvin Karetski, a senior CDA supervisor, testified that no reevaluation was performed because he personally "didn't agree with" the Department of Personnel. (Tr. 3:48-49).

In April 1982, respondent was transferred from CDA to the Heritage and Urban Design Commission. This transfer led inexorably to respondent's loss of his job; at CDA respondent's seniority protected him from being laid off, but at HUD respondent was the only employee in a job which was soon abolished. (Tr. 3:124). Top St. Louis officials gave sharply conflicting accounts of who decided to transfer respondent from CDA to HUD. The transfer was actually announced by CDA Director Hamsher. (Tr. 1:67). Hamsher, however, insisted the real decision was made by the Mayor, and that CDA was merely following orders. (Tr. 3:200). William Edwards of the Mayor's office, on the other hand, testified that the Mayor merely accepted

the recommendation of Director Hamsher. (Tr. 2:185). The director of the Department of Personnel, William Duffe, testified the decision had been made jointly by himself, Director Hamster, and Commissioner Jackson. (Tr. 3:144). But in his pre-trial deposition, Duffe suggested the decision would have been made by the Board of Estimate and Apportionment (Tr. 2:180), a view which was shared by respondent. (Tr. 1:75). There was documentary evidence indicating the transfer had been approved by Jack Weber, the city Budget Director (PX 129; Tr. 1:74). Respondent attempted to appeal the transfer to the Civil Service Commission but the Commission declined to hear the appeal because it believed that the transfer had not injured respondent. (Tr. 3:119).

The transfer to HUD might not have

led to respondent's layoff if he had had an important function at that agency, but at HUD respondent was given essentially menial clerical tasks.[6] Again, however, city officials disagreed about who was responsible for those menial assignments. HUD apparently maintained that from the outset it simply had no need or place for a person with respondent's managerial and architectural skills. (Tr. 1:71, 2:90). CDA Director Hamsher insisted, on the other hand, that he intended to transfer to HUD most or all of the work respondent had earlier been doing at CDA. (Tr. 1:68, 3:171-7). Hamsher argued that HUD Commissioner Jackson was responsible for assuring that that transfer of functions from CDA actually occurred. (Tr. 3:197). Personnel Director Duffe testified that

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[6] Tr. 1:67-68, 73, 77; 2:14-16, 67, 85, 154-55; 3:254-55.

the head only approved respondent's transfer because Hamsher assured him that respondent's job responsibilities were being moved as well, and that he did not know that this representation was not carried out. Had he subsequently learned what respondent was really doing at HUD, Duffe insisted, he would have questioned the propriety of the transfer itself. (Tr. 3:128). Documentary evidence, however, showed that within months of the transfer to HUD, a memorandum was sent to Duffe describing respondent's menial responsibilities, and noting that Praprotnik was "grossly overqualified" for his new position at HUD. (PX 92; Tr. 1:80; see also DX E3, DX E4, DX E9).

Respondent's brief tenure at HUD was marked by continued hostility from higher authorities. On October 16, 1982, Commissioner Jackson decided, on the basis of an adverse performance evaluation, to reduce respondent's salary; that salary reduction was overturned by the Service Rating Appeals Board. (Tr. 1:79-81, 2:68-70). In March 1983 respondent's position at HUD was reclassified from a level 59 to a level 55; there was conflicting testimony regarding whether the Civil Service Commission or the Department of Personnel was responsible for the reclassification. (Tr. 1:81, 3:113). This reduction had the practical effect of precluding respondent from receiving further raises. (Tr. 2:26). In response to an inquiry from HUD, Personnel Director Duffe explained that the reclassification was based on interviews with HUD officials regarding respondent's particular responsibilities at HUD. (Tr. 2:71). Both respondent and Commissioner Killen, however, testified that no such

interviews had ever occurred. (Tr. 2:71-73, 167, 168). At two other unspecified times in 1983 respondent was reprimanded and suspended by Director Killen; both actions were appealed to the Civil Service Commission, which apparently took no action on those appeals. (Tr. 2:72-73).

Beginning in the fall of 1982 there were repeated attempts to lay off respondent. On November 4, 1982, Commissioner Jackson requested that the Department of Personnel issue a layoff list for HUD (PX 133); on the same day Director Duffe issued such a list, which contained only one name -- James Praprotnik. (PX 134). A letter announcing the layoff was drafted, but for unexplained reasons was never sent. (PX 135; Tr. 1:78-79). In February 9, 1983, then Acting Commissioner Killen proposed to

Director Nash that respondent's job be abolished. (PX 137). On July 1, 1983, Commissioner Killen wrote to John Temporiti, the Mayor's Chief of Staff, requesting a budget change that would have eliminated respondent's position. On November 2, 1983, Commissioner Killen submitted to Director Patterson a HUD budget that excluded respondent's job. A layofff notice was finally issued in late December, 1983, effective on the 30th of that month. (Tr. 1:84, 85).

The relevant agency heads again gave sharply conflicting accounts regarding who decided to lay off respondent. Commissioner Killen asserted the decision was for Directors Nash and Patterson to make. (Tr. 2:172). Director Nash insisted that CDA Director Deborah Patterson made the decision, since HUD received all its funds from CDA. (Tr. 2:193). Director Patterson testified that Director Nash had made the initial recommendation, which was actually approved by the Board of Estimate and Apportionment, and that she had no authority to veto the layoff. (Tr. 3:52-63, 67). Director Duffe asserted that Nash and Killen had made the decision. (Tr. 2:182). Respondent appealed the lay off to the Civil Service Commission; for reasons not explained in the record the Commission never acted on that appeal. (Tr. 2:73, 3:118).[7]

(3) The Defense of the Individual Claims. At trial the office of the St. Louis City Counsellor undertook to

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[7] In the eighth circuit, petitioner suggested that, despite an unexplained delay of several years, it was "altogether possible" that the Commission might act on the appeal and restore respondent to his job. Petition for Rehearing and Suggestion for Rehearing En Banc, p. 10. Petitioner no longer advances such a contention.

represent the three individual defendants as well as the city itself. One of the primary defenses offered by the city attorney on behalf of the three individual defendants was that the allegedly unconstitutional treatment of which respondent complained had been the work of high ranking officials other than the three named defendants.

In her opening statement the assistant city attorney stressed that during the period in question respondent had worked under four agency Directors, two of whom were not among the named individual defendants. (Tr. 1:19). During the presentation of respondent's case, the city attorney used her cross examination to emphasize that the actual layoff order had been signed by Commissioner Killen, not by one of the named defendants (Tr. 2:83), and that although

respondent had been verbally abused by a member of the Mayor's cabinet, that Cabinet Member too was not a named defendant. (Tr. 3:8). At the close of respondent's case, the city attorney moved on behalf of the individual defendants for a directed verdict, arguing that the individuals actually responsible for the treatment of which respondent complained were not the named defendants, but Directors Killen, Nash and Spaid, and Supervisor Karetski. (Tr. 3:14-26).

The city's own case focused heavily on an effort to lay any blame on individuals who were not among the named defendants. Defendant Kindelberger insisted he had given respondent a low rating only because ordered to do so by CDA Director Spaid. (Tr. 3:226). Defendant Hamsher insisted the Mayor had personally ordered the transfer of respondent to HUD, and denied having "pushed" for that decision. (Tr. 3:199-200). Director Hamsher also insisted that, if no job functions had been transferred from CDA to HUD, that was the fault and responsibility of HUD Commissioner Jackson. (Tr. 3:197). Defendant Patterson disputed testimony by Director Nash and Commissioner Killen that she made the final decision to lay off respondent, insisting that Nash had sole authority over that question. (Tr. 3:59-60, 62-63). In the face of indisputable documentary evidence that the Serra sculpture incident played a role in respondent's adverse 1981 rating, the city called as a defense witness Supervisor Alvin Karetski, who testified that he had done this on his own initiative, and not under orders from defendants

Kindelberger or Hamsher. (Tr. 52).

Much of the city attorney's closing argument emphasized the city's contention that defendants Patterson, Hamsher and Kindelberger were not the sole or primary culprits:

> [T]his case is an attempt to hang all the ills that ever occurred to James Praprotnik on three people, all the ills that occurred over a four-year period and under four different bosses ... on three people. And I don't think that's fair at all; I really don't....
>
> Chuck Kindelberger ... was Al Karetski's second rater. Unfortunately, he agreed with Al Karetski, and they rated Mr. Praprotnik adequate. Al Karetski is not a defendant in this thing. Chuck Kindelberger is. He wasn't even the first rater, but he's going to take the rap for that if you find against him on that....
>
> Now, another thing I would like you to consider is, who is not a defendant in this matter. Who is not a defendant. Donald Spaid is not a defendant. Donald Spaid is the guy who laid that first suspension on ... who allegedly got so angry that he would go to any lengths to retaliate, directed his subordinates to retaliate.

> Donald Spaid is not a defendant in this case. Okay?
>
> Who laid Jim Praprotnik off? Who really laid him off? Who signed off on the form? Rob Killen signed on the form.... It was his decision....
>
> Who else is not a defendant? Rob Killen's boss, Tom Nash. Tom Nash allegedly approved it and went along with Rob Killen. Do you see him here? Nope. Lets hang it on these guys.
>
> Let me think who else is not here? Henry Jackson was the commissioner of Heritage and Urban Design when Jim Praprotnik first got transferred over there. Henry Jackson is the one who gave him all the rotten assignments.... Frank Hamsher testified that once this man went over there, he didn't have anything to say about what he did. He understood he would be doing work at the same level. But Henry didn't see it that way.... Henry Jackson's not a defendant. He's not here to answer for his actions. So I'd like you to bear that in mind, too, when you consider what happened to Mr. Praprotnik .. and who should pay for it.

(Tr. 4:48-52).

Counsel for respondent replied by insisting that the city should be held

liable even if, as the city attorney had suggested, the particular high officials responsible for the constitutional violation were not among the named defendants:

> [Counsel for the defendants] said we didn't sue enough people. Well, may be we didn't but ... we brought the ones we felt had mistreated Mr. Praprotnik.
>
> Now, she says maybe there are other high officials we should have brought in; that's why we sued the City of St. Louis. If other high officials did this to him, then the City is responsible.

(Tr. 4:56). After substantial deliberation the jury returned a verdict against the defendant City of St. Louis, but in favor of the individual defendants Hamsher, Patterson, and Kindelberger.

SUMMARY OF ARGUMENT

I. Appellate courts are not authorized to reconsider de novo whether a constitutional violation was caused by an official policy or action. Appellate review of a jury verdict under Monell is limited to determining whether the jury was properly instructed, and whether there was sufficient evidence to support the jury's decision. Rule 51, F.R.C.P..

II. The jury instructions regarding municipal liability were drafted and proposed by the city itself. The actual instructions to the jury did not direct it to impose liability for any constitutional violation caused by an official with "final authority." The eighth circuit's legal theory, regarding "final authorities", whatever its meaning, simply was not the basis on which the

jury was charged.

Municipal liability under Monell extends in some circumstances to officials exercising delegated authority The policy at issue in Monell itself was adopted by an Assistant Deputy Administrator of the city Department of Social Services, exercising delegated authority, not by any individual with what petitioner describes as "ultimate authority." The prosecuting attorney in Pembaur v. City of Cincinnati, 89 L.Ed.2d 452 (1986), had no direct or "ultimate" authority over deputy sheriffs, but was exercising authority delegated to him by the county sheriff.

The existence of a municipal rule prohibiting a particular constitutional violation does not invariably immunize the city from liability for such a violation. Such rule, like the ostensible state legal rights of freedmen in 1871, may have little influence on actual government practice. Monroe v. Pape, 365 U.S. 167 (1961). The existence of such a rule is relevant to, but not conclusive of, a Monell claim.

III. There was ample evidence to support the jury verdict. Petitioner urged the jury to conclude that in St. Louis personnel policy was made solely by the Civil Service Commission, the Department of Personnel, and the Board of Service Rating Appeal. Respondent argued that policy could also be made by the individuals alleged to have been involved in the retaliatory dismissal -- the Mayor, the Mayor's staff and Cabinet, and half a dozen agency Directors and Commissioners. These conflicting contentions presented essentially factual issues properly left with the jury.

IV. The jury verdict against the city was entirely consistent with the jury's verdict exonerating the three named individual defendants. The evidence indicated that at least 13 other high ranking city officials might have been responsible for the retaliatory dismissal. The city attorney, in her closing argument on behalf of the three individual defendants, repeatedly insisted that any constitutional violation had been the work of city officials other than those three defendants.

ARGUMENT

I. WHERE A JURY HAS FOUND A CITY LIABLE UNDER MONELL, THE ROLE OF AN APPELLATE COURT IS LIMITED TO REVIEWING CHALLENGED INSTRUCTIONS AND ASSESSING THE SUFFICIENCY OF THE EVIDENCE

The threshhold question presented by this case is whether, as petitioner appears to assume, appellate courts have the authority to decide de novo whether a constitutional violation was caused by an official policy or action within the meaning of Monell. Petitioner argues:

> Who speaks for the city? And when does he who may speak for the city speak for the city, and how does he do so? Finding answers to these difficult questions has been the task of the lower federal courts and of this Court since ... Monell.

(P. Br. 15-16). Petitioner thus urges that on appeal this Court should decide for itself which high level St. Louis authorities in the years 1980-83 were officials "whose edicts or acts may

fairly be said to represent official policy." Monell, 436 U.S. at 695. We contend that neither Monell nor the Seventh Amendment permit an appellate court to disregard in this manner the verdict of a federal jury.

The decisions of this Court do not authorize such a de novo appellate reconsideration of a matter previously presented to and determined by a Seventh Amendment jury. In Oklahoma City v Tuttle, 85 L.Ed 2d 791 (1985), the city petitioner urged this Court to make its own determination regarding whether the alleged constitutional violation was the result of a municipal policy or practice.[8] This Court declined to do so, restricting its inquiry to an evaluation of the correctness of the challenged jury instruction. 85 L.Ed.2d at 802-04. In Springfield v. Kibbe, 94 L.Ed 2d 293 (1987), the Court emphasized that even a purely legal issue regarding the meaning of Monell could not ordinarily be addressed on appeal unless that question had been preserved and presented as a challenge to a jury instruction.94 L.Ed.2d at 297-98.

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[8] Brief for Petitioner, No. 83-1919, p. 21.

In this case, as in Tuttle and Kibbe, the jury was asked, with the consent of both parties, to decide whether the defendant city could be held liable under Monell. In all three cases the juries were instructed that liability could be based only on an official policy of practice, and not merely on the doctrine of respondent superior.[9] The appellate courts are not, of course, at liberty to simply disregard the verdict

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[9] See, e.g., id. at 21.

of a properly instructed jury, even if the question decided by that jury is particularly important, controversial, or interesting.

A jury verdict in a Monell action is not, of course, immune from appellate scrutiny. If a municipal defendant wishes to frame and preserve for appeal some issue of law, the defendant can do so, provided that, as required by Rule 51, F.R.C.P., it objects to the instructions given by the trial judge and makes clear, through its own proposed instructions or in some other manner, what direction it contends should have been given to the jury. In the absence of such an objection under Rule 51, a party is still free to argue, subject to the constraints of the Seventh Amendment, that the evidence was insufficient to satisfy the legal standard articulated in the unchallenged jury instructions. But the ultimate question of whether a city should be held liable under Monell, like the ultimate question of whether a Title VII defendant engaged in intentional discrimination, is not an issue which the appellate courts are authorized to reconsider de novo. Cf. Pullman Standard Co. v. Swint, 456 U.S. 273, 287-89 (1982).

Any appellate attempt to make such a de novo determination regarding municipal liability would ordinarily run afoul of the Seventh Amendment. In most actions brought under Monell there are critical disputes of facts regarding the cause and circumstances of the alleged constitutional violation. Any application of Monell ordinarily requires determination as to the identity, rank, authority and role of each of the government officials

involved. In this case, for example, there was sharply conflicting testimony regarding which of the high ranking St. Louis officials involved had actually made the decisions of which respondent complained. Other issues often bearing on Monell, such as the existence and scope of delegated authority, the degree of knowledge and supervision by higher authorities, and the extent to which relevant written rules were systematically ignored or enforced, all raise essentially factual problems. Questions of causation and foreseeability are factual matters which have traditionally been consigned to the jury in tort or contract actions. The parties in a case such as this will often be in disagreement regarding which policy or practice, official or otherwise, caused the constitutional violation complained of.

In *Monell* litigation it will only rarely be possible to identify a substantial core of undisputed acts to which an appellate court would apply any legal principles properly preserved under Rule 51.

In the evaluation of such often conflicting evidence, a jury will frequently be required to rely on its understanding of the realities of government in the jurisdiction at issue. The application of *Monell*, like the implementation of *White v Register*, 412 U.S. 755,769 (1973), frequently turns on an "intensely local appraisal" of the evidence presented. Otherwise similar testimony might lead a local jury to quite different conclusions depending on whether the incident at issue involved, for example, the city of Chicago or a small term in downstate Illinois. In

resolving a *Monell* claim a jury must bring to its deliberations some fundamental knowledge of the local government and politics. In the instant case, for example, counsel for respondent in his closing argument urged the jury, without recorded objection, to weigh the evidence in light of its understanding of the structure and operation of the St. Louis City government.[10] Appellate courts are uniquely ill-equipped to evaluate evidence in this informed manner.

The application of *Monell* is rarely a mechanical task, even when the relevant facts are largely undisputed. *Monell* authorizes the imposition of liability on a city where a constitutional violation was caused by "those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. (Emphasis added). The standard of "fairness" under Monell, like the standard of reasonableness in tort, often requires the finder of fact to apply to the evidence a degree of judgment and common sense. There are innumerable possible variations in the number and authority of the officials who might be involved in a particular constitutional violation, and in the governmental context in which those officials serve. Monell does not and could not purport to draw a bright line clearly distinguishing which combinations of circumstances would and would not "fairly" give rise to municipal liability.

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[10] "I think that we must bear in mind what happens in the City of Saint Louis. We know that this is a political town. We know that when a person does certain things, exercises maybe certain rights or speaks up about things about the Serra Sculpture, particular [sic], if Mr. Pulitzer is interested in it or the mayor's interested in it, that person may be on his way out the door, even though he has civil service status."

Tuttle and Kibbe adhere to the traditional constraints on appellate review of jury verdicts. Within this well established approach an appellate court can evaluate legal issues preserved by timely objections to jury instructions, and can inquire into the sufficiency of the evidence to satisfy the standard set forth in the instructions. But if an appellate court determines that the instructions were either proper or unchallenged, and that the evidence was sufficient to support a verdict under those instructions, the role of the court is at an end; in such circumstances the court is not free to substitute its own evaluation of the evidence for that of the jury.

II. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY REGARDING THE SCOPE OF MUNICIPAL LIABILITY UNDER MONELL

The district court gave the jury two

instructions, both drafted by the counsel for the city, regarding the scope of municipal liability under Monell. Those instructions explained that "as a general principal a municipality is not liable under 42 U.S.C. § 1983 for the actions of its employees," and that municipal liability is limited to constitutional violations "visited pursuant to an unconstitutional governmental custom, usage or policy knowingly followed by the municipality." (JA 113, 115)(Emphasis added). The court further explained, in words framed by the city itself, that official policy included acts of "high government officials". (JA 113). Petitioner did not object to these instructions in the district court, in the court of appeals, or in its petition for certiorari.

In this Court, however, petitioner

advances in this Court a variety of legal arguments which, if correct, would require the conclusion that the instructions framed by petitioner's own counsel, and agreed to and used by the district judge, were erroneous or inadequate. We urge that petitioner cannot challenge in this manner the instructions to which it consented at trial, and that the substance of those instructions was, in any event, entirely proper.

(1) Liability under Monell is not limited to systematic practices, but encompasses as well even a discrete action taken by "those whose edicts or acts may fairly be said to represent official policy." Monell, 436 U.S. at 694; Pembaur, 89 L.Ed.2d at 463. In the instant case counsel for respondent repeatedly made clear that the claim against the city was based, not on an

assertion of a widespread practice of retaliation, but on an allegation that the retaliatory measures directed by city officials of such high rank that their conduct in even a single case might fairly be said to represent official policy.[11] Petitioner acknowledged in its eighth circuit brief that at trial "plaintiff relied exclusively on the theory that a ... constitutional tort inflicted on him by 'high City officials', was sufficient to impose liability on the City".[12]

At the conclusion of the testimony counsel for petitioner proposed an instruction authorizing the imposition of liability on a city because of actions of a "high government official", which was accepted by the district court and utilized verbatim as instruction No. 15, provided:

> As a general principle, a municipality is not liable under 42 U.S.C. § 1983 for the actions of its employees. However, a municipality may be held liable under 42 U.S.C. § 1983 if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision. (JA 113) (Emphasis added).

Petitioner did not request that the trial court define in greater detail what constituted a "high government official", and did not suggest that the trial judge, rather than the jury, should decide which of the officials implicated in the case were "high government officials".

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[11] Respondent relied on this "high government official" standard in seeking reinstatement of the City as a defendant. (JA 28-32). The district court made clear it was allowing the case to proceed against the city solely because of this contention. (Order of Oct. 5, 1984, p. 2). Respondent relied on the "high government offical" theory in his opening statement (Tr. 1:4), closing argument (Tr. 4:31-34), and opposition to the City's request for a directed verdict. (Tr. 3:29, 4:23). The city attorney expressly agreed that municipal liability could be based on acts of "high ranking officials." (Tr. 3:28).

[12] Brief for Defendant-Appellee City of St. Louis, No. 85-1145-EM (8th Cir.), p. 24.

In this Court, however, petitioner now attacks Instruction No. 15 as lacking in "precision". (P. Br. 14 and n.5). We recognize that there may be circumstances in which a particular additional clarifying instruction, if requested in a timely fashion, might be helpful or even necessary. But the language of Instruction No. 15, as drafted by counsel for petitioner, seems to us entirely serviceable. The terms of the instruction comport with the requirement of Monell that municipal liability be limited to cases involving actions by officials whose conduct can "fairly be said to represent official policy." Given the enormous variety of ways in which authority is distributed within the

tens of thousands of local government bodies in the United States, it would be manifestly impossible to frame any instruction or combination of instructions that could delineate in most or even many cases which officials were and were not of sufficient stature to speak for a particular locality. Monell litigation frequently presents complex disputes about the authority, responsibility, conduct, selection, supervision, disciplining and training of the various officials involved. In determining what mix of circumstances is sufficient to show that the actions of the responsible officials represented official policy, juries often must rely on their common sense and on their judgment regarding the fairness of imposing liability on the city. Monell does not suggest that the courts must or should undertake the Sisyphean task of attemptint to frame instructions so "precise" that they specify exactly which officials under which circumstances can fairly be said to speak for a city.

(2) Petitioner devotes much of its brief to criticizing the eighth circuit's opinion regarding when a city employee with "final authority" over an issue is for that reason a municipal policymaker. (P. Br. 15-24). Petitioner reads the court of appeals opinion to hold that whenever a particular decision of a city employee is not subject to de novo review by higher authorities, that employee is ipso facto a municipal policymaker, and every decision involved is an official city policy.

We do not understand the appellate court to have adopted such a sweeping rule. In the court of appeals the city

argued that, even if Nash, Killen, and the others had delegated authority to make municipal personnel policy, they lacked "final authority" with regard to any decision if that decision was "reviewable by others." (See Pet. App. A-9).[13] In response to that contention,

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[13] Brief for Defendant-Appellant City of St. Louis, No. 85-1145-EM (8th Cir.) pp. 26-27):

> "Although each individual defendant had responsibilities for making initial personnel and budgeting decisions affecting City employees subject to them, none of them had final authority in this regard. By law, their personnel actions had to be (and were) reviewed by the director of personnel, and could also be (and were) reviewed by the civil service commission. Their budget decisions were reviewable by the City's board of estimate and apportionment including the Mayor, comptroller, and the president of the board of alderman, and the City's board of alderman.... The decision of [Nash and Killen] was also reviewable by others...."

In its eighth circuit Reply Brief the city described the issues presented by this case as including, whether a city the eighth circuit merely concluded that, where an official otherwise has authority to make municipal policy, he or she does not "automatically" cease to be a policymaker solely because of the presence of some limited appeal process. (Pet. App. A-9). The holding of the eighth circuit is not that the absence of an appeal process *creates* policymaking authority, but that the availability of such an appeal process does not necessarily *insulate* a city from liability for actions that would otherwise constitute official policy. The court of appeals' actual holding is clearly correct. *Meritor Savings Bank v. Vinson*, 91 L.Ed.2d 49, 63 (1976).

Had the "final authority" theory criticized by petitioner actually been embodied in an instruction directing a jury to impose liability on that basis, we agree that the giving of such an instruction would have been reversible error. But in this case, of course, there never was any such instruction.

Petitioner urges this Court to hold that no municipal official can be a policymaker under *Monell* unless the

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could be held liable under *Monell* "where ... a civil service system assured that final employment decisions were not made even by the policymakers identified by plaintiff as being illegally motivated in their conduct." Reply Brief, p. iv. Petitioner urged in that Reply Brief:

> "Even accepting that ... the Mayor or the City's board of estimate and apportionment were involved in the decision to transfer and lay plaintiff off .. or that ... Killen ... and Nash ... were 'policymakers' ... [p]plaintiff's case is still patently defective for the simply reason that *none* of the 'high officials' he mentions in his brief were the final authority in personnel decisions for the City. Under the City Charter ... only the civil service commission of the City had ultimate control over employment decisions".

Id., p. 6. (Emphasis in original).

official is what petitioner characterizes as an "ultimate authority". (P. Br. 22-26). Under this proposed doctrine a high ranking municipal official, no matter how great his or her authority or responsibility, would not be an "ultimate authority" if he or she was "subject to the direction and control of any other city official." (P. Br. 25). The central tenet and significance of petitioner's proposed "ultimate authority" doctrine is that a city could never be held liable for a practice, policy, or action adopted by an official exercising delegated authority. (P. Br. 26-27). Prior to the filing of its brief on the merits, petitioner expressly acknowledged, both in its original petition (Pet. 12), and in the court of appeals,[14] that

municipal liability could be based on the exercise of delegated policymaking authority.

The "ultimate authority" doctrine now proposed by petitioner is clearly inconsistent with the decision in Monell itself. The unconstitutional layoff policy in Monell had not been adopted by the New York's Mayor or City Council, or any other official immune from "control" by higher authorities. The written citywide regulations in Monell did not require a pregnant woman to leave her job, but merely insisted that she receive "the approval of the agency head."[15] The agency head, who was under the direction and control of the Mayor, had only delegated not "ultimate" authority. In the head of the New York City Department of Social Services the agency head did not himself make any decision regarding layoff practices, but delegated that responsibility to an Assistant Deputy Administrator for Personnel Management.[16] It was the Assistant Deputy Administrator, exercising re-delegated authority, who adopted the practice of laying off all women who were more than five months pregnant. Despite the manner in which this decision was made, this Court had no doubt that the layoff rule constituted an official policy under Monell.

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[14] Petition for Rehearing and Suggestion for Rehearing En Banc, No. 85-1145-EM (8th Cir.) p. 6 (an "individual employment decision is transmuted into a government policy ... where the government has 'delegated its power to establish final employment policy' to the particular decisionmaker").

[15] The regulation is quoted in "Civil Rights Litigation After Monell", 79 Col. L. Rev. 213, 220 (1979).

In Pembaur the county prosecutor who authorized the break-in there at issue had no "ultimate authority" over the

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[16] Id.

deputy sheriffs who entered Dr. Pembaur's office. In issuing that directive, the prosecutor was acting under a "delegation of authority" from the Sheriff's office. 89 L.Ed.2d at 466. The decision to refer the matter to the County Prosecutor was made, not by the County Sheriff, but by an unnamed "supervisor" in the Sheriff's office, 89 L.Ed.2d at 458, to whom the Sheriff had evidently delegated the authority to make such referrals. Although the County Prosecutor, in giving a legal opinion, was not subject to the "direction and control" of the Sheriff or the unnamed supervisor, both the Sheriff and that supervisor retained direction and control over the policy decision, and could have overridden the prosecutor's advice and instruction had they wished to do so. Justice Brennan emphasized that "authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possess such authority". 89 L.Ed.2d at 465. Neither the concurring opinions nor the dissenting opinion in Pembaur indicated any disagreement with this view.

If, as petitioner suggests, a city could never be held liable for policies adopted by officials exercising "delegated" authority, municipalities could effectively nullify Monell by the simple expedient of delegating critical decisions to officials other than the "ultimate authorities". Where a mayor knew or suspected that a proposed policy was unconstitutional, he or she could insulate the city from liability merely by directing that a deputy mayor or an agency head actually decide to adopt that policy. It is inconceivable that the

framers of section 1983 could have intended to permit the law to be evaded in this manner.

Even in the absence of such a deliberate scheme to immunize a city, the proposed "ultimate authority" doctrine would often have the practical effect of eviscerting Monell. In any given city there would be only a handful of officials who were "ultimate authorities"; within the executive branch, the mayor would frequently be the only person who satisfied petitioner's proposed test. None of the policies, rules, and regulations adopted by city agencies would, on petitioner's view, constitute "official" policies. An agency head with a staff of thousands, a multi-billion dollar budget, and control over the lives of millions of city residents, would on petitioner's view be a mere "underling" (P. Br. 27) whose actions could not, as a matter of law, "fairly be said to represent official policy". Although the conduct of municipal in many large cities is generally governed by longstanding binding written regulations, on petitioner's view those regulations would be simply irrelevant unless they were personally approved by the mayor, rather than by an agency head or board under the direction and control of the mayor.

Petitioner suggests that in order to ascertain whether an official was subject to the "direction and control" of another official, it would be necessary merely to consult the local charter or state legislation. But the actual distribution of direction and control within a government body is often far from apparent, and may in reality differ substantially from the allocation suggested

by a reading of the applicable written rules. Experience at the federal level demonstrates the ease with which reality may differ from the such literal rules. The FBI under J. Edgar Hoover, for example, was officially under the direction and control of the Attorney General; in practice, however, Director Hoover had virtually total autonomy, dealing with Attorneys General and Presidents as if he were a sovereign power. Conversely, the statutory mandate of the Civil Rights Commission contemplates it will be completely immune from direction or control by executive officials; some congressional critics, however, have suggested that in reality the relationship of the Commission to the White House is more that of a lap dog than a watch dog. Such disputes illustrate the enormous problems that could arise if liability under Monell turned largely on who exercised control and direction over whom within a given city.

We do not suggest that every city worker who exercises any form of delegated authority is for that reason alone a municipal policymaker. Clearly many are not. On the other hand, the decisions of this Court do reflect a variety of situations in which an exercise of delegated authority would fairly be characterized as an official act or policy. If city policy expressly authorizes, but does not require, city employees to take a given action, such as shooting at unarmed non-dangerous fleeing felons, an employee who makes the delegated decision to engage in that authorized conduct can fairly be said to act on behalf of the city. See Springfield v. Kibbe, 94 L.Ed.2d 293, 303

(1987)(O'Connor, J., dissenting). Cf. Tennessee v.Garner, 85 L.Ed.2d 1 (1985). If city officials deliberately close their eyes to the existence of a particular unconstitutional practice, that inaction would effectively delegate to subordinates the authority to engage in that abuse, cf. Brandon v. Holt, 469 U.S. 464, 467 and n.6 (1985); petitioner appears to concede that a city could be held liable in such a situation. (P. Br. 27). If a city official delegates to subordinates carte blanche in a particular area, such a complete "failure of supervision" would provide an appropriate basis for relief against the city itself. Monell, 436 U.S. at 694 n.58. See generally J. Lobel, Civil Rights Litigation and Attorney Fees Annual Handbook, v. 2, pp. 35-37 (1986).

On petitioner's view only one person

or board within a given city, such as a civil service commission, could make personnel policy within the meaning of Monell. Such an "ultimate authority" might delegate to individual agencies or their directors authority to make personnel rules for particular agencies, but for Monell purposes those rules would not be "policies" at all, even if clearly within the authority delegated by the "ultimate authority." This doctrine is entirely inconsistent with what St. Louis, and most other cities, in practice regard as official policy. In justifying Praprotnik's original two week suspension, both the city attorney and the city's witnesses asserted that discipline was appropriate because respondent had allegedly violated the personnel policies applicable to the Community Development

Agency.[17] On petitioner's view a CDA agency rule regarding secondary employment would be an official policy under municipal law, a rule which all agency workers were required to obey on pain of suspension, or dismissal, and a rule which the city Civil Service Commission would enforce if violated. Yet the same rule, petitioner suggests, would not be official policy for federal law purposes under Monell. Neither Monell nor its progeny contemplated such an incongruous result.

(3) Petitioner asserts, finally, that a city can never be held liable under Monell if the municipality had in effect a rule prohibiting the constitutional violation at issue. (P. Br. 24-25, 28-31). Were that the law, petitioner

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[17] Tr. 2:31-32, 118-20, 122, 216-18; 3:209.

might have been entitled to an instruction to that effect had a timely request been made at trial. In fact, however, petitioner never asked for any such instruction; in this Court petitioner argues at length that a retaliatory layoff would violate the city charter (P. Br. 29-30), but no such contention was made to the jury or trial court. We agree that a jury could and should consider whether an alleged constitutional violation was contrary to a municipal rule, but we disagree with petitioner's suggestion that the mere existence of such a prohibition would always be absolutely conclusive of the issue of municipal liability.

Petitioner does not, of course, contend that a federal constitutional prohibition against retaliatory dismissals is an expression of St. Louis

municipal policy. Neither the framers of the First Amendment, nor the federal judges who have interpreted that guarantee, could be "fairly said to represent" official St. Louis' policy. At times in our history cities and states have openly and defiantly adhered to policies which they knew full well violated the constitution and laws of the United States; de jure segregation remained an official policy in certain regions long after Brown v. Board of Education, 347 U.S. 483 (1954). This Court in Owen v. City of Independence, 445 U.S. 622 (1980), was divided as to whether a city could be held liable for good faith constitutional violations, but every member of the Court in Owen agreed that a city would be held liable for policies that it knew or should have known were unconstitutional,[18] a view which pretermits any suggestion that a municipal practice must be deemed not "official" under Monell whenever the practice is patently unconstitutional. Petitioner does not suggest that the existence of a clear federal constitutional prohibition against retaliatory dismissals is of any relevance in determining the substance of St. Louis municipal policy.

What petitioner does contend is that a municipality can acquire absolute immunity from liability under Monell by the simple expedient of adopting a prohibition against a particular constitutional violation. Once that was done, a municipal policymaker who directed or engaged in such a violation would, on

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[18] See, e.g., 445 U.S. at 669 (Powell, J., dissenting) ("[L]iability should not attach unless there was notice that a constitutional right was at risk").

petitioner's view, be acting "contrary to orders". (P. Br. 25). This immunity is not limited to instances in which a city has adopted such a prohibition "in so many words" (P. Br. 29); it is enough, petitioner suggests, that such a restriction was "implicit" in the city charter or other official policy. (Id.). On this view a city might conceivably acquire immunity from suits over retaliatory dismissals if the city adopted a rule requiring municipal employees "to obey the first Amendment", or even directing them "to obey the United States Constitution and the decisions of the Supreme Court." There are, we believe, three distinct reasons why such a prohibition, whatever its specificity, should not be given conclusive weight in determining municipal liability under Monell.

First, although a policy prohibiting retaliatory dismissals would make such dismissals less likely, another municipal policy might nonetheless actually cause such constitutional violations. A plaintiff in a Monell action need not prove that the city had an unconstitutional policy, so long as he or she establishes that a city policy foreseeably caused the constitutional violation at issue. In Springfield v. Kibbe, 94 L.Ed.2d 293 (1987), Justice O'Connor noted in her dissenting opinion that even though a city might have entirely constitutional guidelines regarding the use of deadly force, the city could still be held liable if its inadequate training or supervision policies predictably led to an unconstitutional shooting. 94 L.Ed.2d at 300-04. Justice O'Connor suggested that it might well be difficult

to prove the existence of such a causal connection, but agreed that a plaintiff was entitled to an opportunity to attempt to do so. (Id.).

The policies for which Monell holds a municipality accountable are the official actions or practices that establish the operative rules of action which guide the conduct of subordinate employees. A city policy is important to those employees and to the private citizens whose rights may be at stake, only because, and to the extent that, the policy actually determines how city workers will act. A written municipal policy forbidding retaliatory transfers, or the use of unwarranted lethal force, might well have the practical effect of establishing the operative standard of conduct. On the other hand, the significance of such a substantive rule might be largely dissipated if the city also had a policy of never actually enforcing those prohibitions, a policy implemented by refusing to scrutinize allegedly retaliatory transfers, (see Pet. App. A-11), or by refusing to investigate or redress incidents of police brutality. See Brandon v. Holt, 469 U.S. at 468 n.6. Similarly, the existence "of a nominal prohibition would be of little significance if in practice responsible city officials routinely authorized, required or engaged in the very conduct forbidden by "the dead words of ... written text." Monell, 436 U.S. at 691 n.56. Here, for example, the St. Louis Employee Manual expressly provides that no employee may be transferred without his consent (Tr. 3:122), but the Director of Personnel insisted that the city in practice would transfer employees

regardless of their opposition. (Tr. 3:132). The appropriate weight to be given to a municipal prohibition against a particular constitution violation is necessarily a factual matter, defendant on a variety of other circumstances, to be addressed in the first instance by the jury or trial judge.

Second, an "order" is only as authoritative as the individual who issues it. In many cases, as here, there will be a substantial dispute regarding which municipal official can be fairly said to make official policy. The finder of fact might reasonably conclude in a given case that those who "violated" a nominal rule could as fairly be regarded as municipal policymakers as those who adopted the rule itself. In the instant case the jury might have concluded that, although the city charter implicitly disapproved of retaliatory dismissals, in respondent's case a decision to engage in such retaliation had been joined in by the Mayor, the Director of the Department of Personnel, and half a dozen other agency Directors and Commissioners. In such a situation Monell would certainly authorize imposition of liability on a municipality.

Third, the interpretation of section 1983 must reflect the legislative history of that statute. The primary concern of the framers of the 1871 Civil Rights Act was that, although the southern states had enacted legislation which gave nominal protection to the rights of freedmen and union sympathizers, in practice the actual policies of those states was to disregard and violate those very rights. Senator Pratt emphasized that the actual treatment of blacks and

union men was very different than the ostensible rules found in state statutes:

> Plausibly and sophistically it is said the laws of North Carolina do not discriminate against them; that the provisions in favor of rights and liberties are general.... But it is a fact .. that of the hundreds of outrages committed upon loyal people ... not one has been punished .... Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid.[19]

As this Court noted in Monroe v. Pape, 365 U.S. 167, 180 (1961):

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced.

Congress had "no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty". 365 U.S. at 176. See also id. 365 U.S. at 174-180; "Civil Rights Litigation After Monell", 79 Col. L. Rev. 213, 231-34 (1979).

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[19] Cong. Globe, 42nd Cong., 1st Sess., p. 505 (1871).

Against that background it is inconceivable that the framers of section 1983 contemplated that, by the simple expedient of adopting a rule against racial discrimination or any other type of unconstitutional action, a city could acquire absolute immunity from liability even where subsequent municipal policies or actions actually caused such constitutional violations.

III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY VERDICT

A. The Constitutional Standard

The Seventh Amendment severely restricts the extent to which the verdict of a properly instructed jury may be reviewed by a federal court. In assessing the sufficiency of the evidence on which a jury based its verdict, neither a trial judge nor the appellate courts are free "to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other conclusions are more reasonable." Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35 (1944). A case must be submitted to the jury "if evidence might justify a finding either way . . .", Wilkerson v. McCarthy, 336 U.S. 53, 55 (1949), and "fair-minded men might reach different conclusions." Bailey v. Central Vermont R. Co., 319 U.S. 350, 353 (1943). A jury verdict may be overturned only in the extreme case in which there is only one possible conclusion that a rational jury could have drawn from the evidence. In enforcing the commands of the Seventh Amendment, this Court has recognized several distinct principles restricting appellate review of the sufficiency of the evidence to support a jury verdict.

First, "the decision as to which witness was telling the truth . . . [is a] question[] for the jury." Ellis v. Union Pacific R. Co., 329 U.S. 649, 653 (1947). If a witness with personal knowledge of a disputed fact testifies before a jury, the jury's conclusion with regard to that fact is ordinarily conclusive. "[I]t would be an undue invasion

of the jury's historic function for an appellate court to . . . judge the credibility of witnesses." Lavender v. Kurn, 327 U.S. 645, 652 (1946). When a jury chooses to believe the testimony of a witness with such personal knowledge of a disputed fact, the Seventh Amendment precludes a federal judge from questioning the veracity of that witness. Conversely, a jury may choose to infer from the demeanor of a witness that he or she is lying about the event or incident at issue. The demeanor of a witness may convince a jury

> not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952)(Hand, J.). Credibility will ordinarily be critical when two witnesses give conflicting testimony about the same subject. Where a case turns on the motivation or knowledge of a particular individual, and that individual testifies before the jury regarding those issues, resolution of the dispute will often be based on the credibility of that witness.[20] A jury's assessment of the credibility of a witness in such circumstances is essentially immune from judicial reconsideration. Cf. Anderson

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[20] See Fishman v. Clancy, 763 F.2d 485, 488 (1st Cir. 1985)("where state of mind is crucial to the outcome of a case, 'jury judgments about credibility are typically thought to be of special importance'"); Knapp v. Whitaker, 757 F.2d 827, 843 (4th Cir. 1985)("The credibility of the witnesses . . . [is] within the purview of the jury, especially in a case such as this which turns, in large measure, upon the defendants' motive . . .").

v. Bessemer City, 470 U.S. 564, 575 (1985).

Second, the drawing of inferences from both disputed and uncontroverted testimony is ordinarily a matter for the jury alone. "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35 (1944).

> Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer . . . know more of the common affairs of life than does one man; . . . they can draw wiser and safer conclusions from . . . facts . . . than can a single judge.

Sioux City & Pacific R.R. Co. v. Stout, 84 U.S. 657, 664 (1874).

Third, an appellate court cannot weight conflicting evidence, or the conflicting inferences supported by different portions of the record.[21] Neither may an appellate court rely on evidence which the jury might have chosen to discount.[22] Thus an appellate court ordinarily evaluates only whether the evidence which supports the prevailing party, together with all reasonable inferences, could rationally support the jury's verdict, and does not consider possibly conflicting evidence supporting

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[21] Gunning v. Cooley, 281 U.S. 90, 94 (1936); Baltimore & Ohio R.R. Co. v. Groeger, 266 U.S. 521, 524 (1975); Great Northern Railway Co. v. Donaldson, 246 U.S. 121, 124 (1918); Corinne Mill, etc., Co. v. Toponce, 152 U. S. 405, 408 (1894).

[22] Lavender v. Kurn, 327 U.S. 645, 653 (1946); Hepburn v. DuBois, 37 U.S. 345, 376 (1838).

the losing party.[23] Any appellate consideration of evidence offered by the losing party would in most circumstances be constitutionally impermissible, since such consideration would generally require an appellate court to weigh or evaluate evidence in a manner reserved for the jury itself. This restriction has a substantial historical foundation, since under a common law demurrer to evidence, from which the modern motions for directed verdict and judgment n.o.v. derive, the moving party could not offer or rely on any evidence of its own.[24]

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[23] Gunning v. Denver & Rio Grande Western R.R. Co., 375 U.S. 208, 210 (1963); Webb v. Illinois central Railroad Co., 352 U.S. 512, 513-14 (1957); Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949); Corinne Mill, etc. Co. v. Toponce, 152 U.S. 405, 408-09 (1894).

[24] Slocum v. New York Life Insurance Co., 228 U.S. 364, 388-95 (majority opinion), 409-17 (Hughes, J., dissenting)(1913).

For these reasons, a verdict in favor of a prevailing plaintiff can virtually never be overturned if the plaintiff has adduced sufficient evidence to establish a prima facie case. Cf. United States Postal Service v. Aikens, 460 U.S. 711, 715 (1983); Pleasants v. Font, 89 U.S. 116, 117 (1875).

Fourth, deference to the verdict of a jury is particularly important in a case such as this seeking redress for unconstitutional conduct by government officials. Justice Rehnquist correctly observed in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), that the Seventh Amendment was adopted in part because its framers believed that juries would often be more vigilant than judges in enforcing fundamental liberties. 439 U.S. at 343-44 (dissenting opinion). Many of the inalienable rights for which

the colonists fought had originally been recognized and enforced by juries rather than by judges. It was jurors, not judges, who first limited the use of libel law in the Zenger case, restricted unreasonable searches and seizures in the Wilkes case, protected religious freedom in Penn's Case, and refused to permit imposition of capital punishment for relatively minor criminal offenses. T.A. Green, Verdict According To Conscience (1985). Where, as here, the vindication of fundamental rights and liberties is at issue, federal judges should be particularly reluctant to interfere with the institution which the Seventh Amendment contemplated would prevent, and provide redress for, violations of the Constitution.

Finally, in assessing the sufficiency of the evidence to support a jury verdict, an appellate court will ordinarily accord substantial weight to the views of the trial judge.

> [I]t is seldom that an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict . . . . [T]he judge is primarily responsible for the just outcome of the trial. . . . He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record . . . . [A]n appellate court will pay large respect to his judgment.

Patton v. Texas & Pacific Railway Co., 179 U.S. 658, 660 (1901).[25] Many of the considerations underlying deference to a trial judge's own findings of fact under Rule 52 are equally applicable to a trial judge's assessment of the sufficiency of the evidence heard by a jury. Supervising jury trials is a major role of federal district judges.

> The rationale for deference . . . is not limited to the superiority of the trial judge's position to make determinations of credibility . . . [W]ith experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Anderson v. Bessemer City, 470 U.S. at 574-75. Where the trial judge and an appellate panel have both upheld the evidence as sufficient to support a disputed verdict, their concurrent assessment carries particular weight in this Court. Story Parchment Co. v. Paterson Parchment Paper, 282 U.S. 555, 560 (1931); Patton, 179 U.S. at 660.

B. The Trial Court Context

In assessing the sufficiency of the

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[25] See also Dick v. New York Life Insurance Co., 359 U.S. 437, 447 (1959); Wilkerson v. McCarthy, 336 U.S. 53, 74 (1949)(Jackson, J., concurring).

evidence to support a jury verdict, an appellate court should ordinarily begin with a review of the closing arguments of counsel. It is often difficult on the basis of the testimony and exhibits alone to clearly understand the nature of the factual disputes which a particular jury was asked to resolve. In many cases there will be matters of fact about which the parties agreed, and which thus were simply ignored by both during the presentation of the evidence. Conversely, the evidence actually introduced may suggest to an appellate court the existence of an issue which was not seriously presented or pursued at trial, since the attorneys were aware of circumstances which made that line of inquiry clearly unfruitful. By using the closing arguments as a point of departure, an appellate court can minimize the

danger that it might resolve the case on some issue extraneous to the actual factual dispute at trial.

In addition, due deference to the preeminent factfinding role which a jury plays under the Seventh Amendment dictates that a party be required to present its factual arguments to the jury itself. As a general rule no party is permitted to advance on appeal factual or legal contentions not raised and preserved below. A party appealing the denial of a motion for a directed verdict must ordinarily confine its brief on appeal to arguments that were first made to the district court which heard that motion. It is no less important that such factual contentions also be squarely presented to the jury itself. The jury trial will not be the "main event", rather than a "try out on the road", if litigants are permitted to defer framing their factual contentions until the case is on appeal. Cf. Anderson v. Bessemer City, 470 U.S. at 575. In virtually any case it will be possible for an attorney with a modicum of ingenuity to frame some hypothetical question not addressed by the evidence, or to conjure up some possible inference never argued for at the trial itself. The central issue on an appeal from the denial of a motion for a directed verdict and for judgment n.o.v., however, should be the sufficiency of the evidence bearing on the factual disputes actually presented to the jury, not the ability of appellate counsel to conjure up new factual issues, however intriguing, which the jury itself was never asked to decide.

In her closing argument the city attorney did not contend that retaliatory

layoffs were prohibited by the city charter, that the mayor and various agency heads involved were without authority to make any policies, or that any of the individuals who had taken action against respondent had exceeded their delegated authority. The factual contention offered by the city appears to have been that the jury should regard the municipal civil service commission and certain other agencies, rather than the Mayor and his Cabinet and staff, as speaking acting on behalf of the city. We set out in the margin the full text of the city's argument.[26] The city's motion

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[26] Tr. 4:55-56:

"I would like to point out to you that, far from following an unconstitutional policy, the City of Saint Louis, at least in this case, went to the opposite extreme. We had available a civil service system and a variety of administrative boards -- the service rating appeal board, the director's office -- which Mr. Praprotnik made use for a directed verdict was limited to the same factual issue.[27] That question should be the focus of appellate scrutiny of the sufficiency of the evidence.

C. The Relevant Evidence

Petitioner did not suggest below, and does not argue here, that it is inherently implausible that a Mayor, his

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of. They were available. So, far from following an unconstitutional policy, we offered him every opportunity for redress and he got it. He got it. In many cases the Commission -- in just about every case the commission never completely ruled in his favor, but in every single case he got some redress, he got modified. That's all I wanted to say on that subject."

[27] Tr. 3:28-29:

"I understand that you can be liable -- a municipality can be held liable if its high ranking officials are allowed to violate someone's constitutional rights. I fail to see how you can find any evidence that the City of Saint Louis did that. On the contrary, the City of Saint Louis has, in place, the Civil Service Commission, which in Mr. Praprotnik's case has redressed what he has viewed as wrongs of the high ranking officials."

or her Cabinet, or agency heads could be municipal policy makers. In some cities such officials are doubtless the only officials who make municipal personnel policy. Elsewhere some citywide rules might be made by a special personnel agency or commission, while individual agency heads were given delegated authority to establish other official policies for workers in their particular agencies. In New York City, for example, there was evidently such concurrent policymaking authority at the time when Monell itself was litigated.

The central factual defense advanced by petitioner at trial was that in St. Louis neither the Mayor, his Cabinet, or ordinary agency heads had no authority, concurrent or otherwise, to make official personnel policy. Rather, petitioner evidently contended, exclusive authority to make such policies was in the hands of the Civil Service Commission, the Department of Personnel, and the Service Rating Appeal Board. In order to sustain its request for a directed verdict, the burden on petitioner was to establish that no rational jury could have concluded that in the City of St. Louis either the Mayor, the Mayor's Cabinet, or the Director or Commissioner of any agency other than the Department of Personnel had any authority to establish official policy regarding personnel matters. Although a reasonable jury could conceivably have sustained petitioner's contention, there was ample basis on which the jury could have concluded otherwise.

The City Charter provisions establishing the Civil Service Commission make clear that the Commission has no

general authority or capacity, exclusive or otherwise, to regulate personnel matters. The Commission itself is composed of three part time members whose annual salary may not exceed $1680. (Tr. 3:93). The primary responsibility of this part time Commission is to adjudicate administrative appeals arising under the civil service rules. (J.A. 63, section 7(d)). Except for enforcing civil service rules established by the charter or local ordinances:

> The commission shall have no administrative powers or duties ... no power to direct or control any employee of the department of personnel or other employee of the city, or the action to be taken by them in any matter or case.

(J.A. 64; section 7(h)). If the Commission favors the adoption of any new municipal employment practice, its only recourse is to recommend such action to the mayor and aldermen. (J.A. 62;

section 7(b)). Thus in many respects the city charter actually establishes a prohibition against policymaking by the Civil Service Commission.

The Director of the Personnel Department testified at trial that he had no control over the substance of personnel practices or decisions, but was empowered only to ascertain whether personnel policies and actions adopted by others were correct as to "form". (Tr. 3:90-92, 125; Pet. App. A-9; cf. J.A. 67, section 9 (i)). Although the Charter authorizes certain other activities by the Director, they are generally ministerial in nature. (J.A. 65-69). The record contains no explanation of the authority or responsibilities of the Service Rating Appeals Board.

A number of the events disclosed at trial substantially undercut petitioner's

characterization of the role of the Commission, Department and Board. In defending the proposed two week suspension imposed on respondent in 1980, the city attorney repeatedly argued that respondent had violated, not any citywide policy regarding secondary employment, but a CDA agency policy established by Director Spaid. That contention, and the evidence offered by the city in support thereof, were clearly inconsistent with the city attorney's later suggestion that an agency head such as Director Spaid had no authority to make personnel policy, and with petitioner's argument in this Court that Spaid's successor, Director Hamsher, also had no authority to establish personnel policy. Similarly, the record did not support the city's suggestion that the Civil Service Commission, through its disposition of appeals, exercised effective control and scrutiny of agency personnel practices. Between 1980 and 1984, the Commission simply refused to act on four of the appeals filed by respondent. The Commission's refusals included the two critical appeals filed by respondent in this period -- the appeal of the 1982 transfer (Tr. 3:119), and the appeal of the 1983 layoff. (Tr. 2:72-73). In the face of that inaction, the jury was certainly not obligated to conclude that the Commission was seriously enforcing a prohibition against retaliation, or any other rule.

Finally, it was far from certain that the agencies characterized by the city itself as policymakers were themselves untainted by the alleged retaliatory scheme. Personnel Director Duffe acknowledged that he was involved in both

the transfer and reclassification decisions. (Tr. 3:113, 144); Duffe's insistence that he knew nothing of respondent's work assignments at HUD was directly contradicted by documentary evidence. (See pp. 22-23, supra). If the jury concluded that Duffe was significantly involved in furthering or facilitating the retaliatory scheme, that conclusion would have called into question both the role of the Personnel Department, of which Duffe was the Director, and that of the Civil Service Commission, of which Duffe was the Secretary. (J.A.87). Under these circumstances the jury was certainly not required to conclude, as the city argued at trial, that none of the high government officials involved in the retaliatory scheme were themselves municipal policymakers.

IV. THE JURY VERDICT AGAINST THE CITY WAS NOT INCONSISTENT WITH THE JURY'S VERDICT IN FAVOR OFTHE INDIVIDUAL DEFENDANTS

The jury's verdicts regarding the city and the individual defendants are, considered in light of the evidence and closing arguments, both consistent and entirely comprehensively. Petitioner grounds its challenge to the consistency of the verdicts on two essential premises -- that the only possible constitutional violation was an illicit purpose in transferring Praprotnik to HUD, and that the sole person responsible for that transfer was defendant Hamsher. Reasoning from these premises, petitioner argues that there was no rational basis on which a jury could exonerate Hamsher while imposing liability on the city. (P. Br. 31-32). But both of the underlying premises are clearly incorrect.

Petitioner does not contend that the jury must have based its verdict against the city on the motive behind the transfer, rather, petitioner contends that this was the rationale of the eighth circuit. "[T]he theory upon which the court of appeals settled was that the unconstitutionally motivated act was the transfer." (P. Br. 34). But the evidence heard by the jury presented at least two entirely distinct theories on which the jury might have imposed liability. First, the jury could have concluded that the transfer itself was legitimate, and that the unconstitutionally motivated act was assigning Praprotnik such menial duties that a layoff was inevitable. Defendant Hamsher insisted he had no control over those assignments, arguing that the responsibility for such matters lay with

Commissioner Jackson (Tr. 3:178, 197); the city attorney urged in her closing argument that Jackson not Hamsher was responsible for those assignments. (Tr. 4:51-52). Second, the jury could have concluded that the transfer and HUD job assignments were legitimate, and that only the layoff itself was the result of a retaliatory motive. There was conflicting testimony as to whether responsibility for the layoff decision was in the hands of the Board of Estimate and Appeal, the Mayor, the Mayor's staff, Commissioner Killen, Director Nash, or one of the three named defendants. The jury could of course have exonerated Hamsher and the other named defendants if it believed another official had in reality made the improperly motivated layoff decision.

Even if one assumes that the sole or critical illicitly motivated action was the transfer, the jury verdicts are still not inconsistent. Petitioner asserts that "there is no dispute but that the transfer was Hamsher's decision". (P. Br. 42). On the contrary, the trial testimony contained just such a dispute. Under questioning by counsel for respondent, Hamsher refused to take responsibility for either making or even aggressively advocating the decision to transfer Praprotnik, insisting that the real decision was the Mayor's alone.[28]

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[28] "Q.Isn't it fair to say, Mr. Hamsher, that you initiated the thing, that you sort of recommended it through the mayor's office, sort of pushed to get it done?

A. I wouldn't say I pushed to get it done. I recommended it to the mayor. The mayor made a decision. And when the mayor makes a decision, all of us who work for him try to carry it out."

At another point Hamsher insisted that Director Nash had played a major role in initiating the transfer. (Tr. 3:199). In light of that testimony, the jury could rationally have concluded that the Mayor or Director Nash, rather than defendant Hamsher, were responsible for the transfer and had acted for illicit retaliatory purposes.

The substantial evidence of culpability by the Mayor and other non-defendant officials, while strengthening the case against the city, tended to undercut respondent's claim that the three named defendants were the particular officials responsible for the retaliatory dismissal. A reasonable jury might also have believed that

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Tr. 3:200. See also Tr. 2:185 (deposition of William Edwards)("the mayor had the final decision").

respondent's dismissal was the result of a retaliatory motive on the part of one or more of the high officials involved, but have concluded that respondent simply failed to meet his burden of proving that the three particular officials named as defendants were the culpable parties.

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,
Petitioner,

vs.

JAMES H. PRAPROTNIK
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITIONER'S REPLY BRIEF

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October Term, 1986

City Of St. Louis,
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vs.
James H. Praprotnik
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITIONER'S REPLY BRIEF

I.

INTRODUCTION

The filing of the briefs of plaintiff and of plaintiff's amicus (The AFL-CIO) has placed this case in a remarkable posture. Plaintiff now abandons the opinion of the Eighth Circuit: he notes that the final authority theory upon which the Eighth Circuit decided the case (Pet. App. pp. A-8 - A-11); *Praprotnik v. City of St. Louis,* 798 F.2d 1168, 1173 - 1175 (8th Cir. 1986) was injected into the case for the first time on appeal, and confesses that "[h]ad the 'final' authority theory criticized by petitioner actually been embodied in an instruction directing a jury to impose liability on that basis, we agree that the giving of such an instruction would have been reversible error." Brief of Respondent, p. 57. Plaintiff thus proceeds to defend, not the Eighth

Circuit's opinion, but rather the Eighth Circuit's judgment affirming the district court's judgment against the City. In asking the Court "to consider grounds supporting his judgment that differ from those in which the Court of Appeals rested its decision", plaintiff requests the Court to use authority that it has reserved for "exceptional cases". *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983).

Likewise, plaintiff's amicus makes no attempt to defend the Eighth Circuit's opinion; rather, plaintiff's amicus urges the Court to repudiate its cases and hold that in a special category of cases - employment cases, and cases involving municipal licenses and contracts - municipal liability may be imposed without regard to the identity or the authority of the municipal actor or decisionmaker. Brief of AFL-CIO, pp. 7-9, 14-17. The theory is, of course, respondeat superior by another name.

Though worthy of being remarked upon, it is not surprising that the test by which the Eighth Circuit decided the case in plaintiff's favor has now been repudiated. During the course of this litigation the City of St. Louis has been a stationary object made the target of marksmen who have constantly changed their positions. Plaintiff's initial complaint, and his amended complaint (J.A. 12-19), alleged nothing relevant to the City other than that plaintiff and the individual defendants were City employees. That is, the pleadings were based upon a respondeat superior theory. Plaintiff's next theory of liability was set forth in his opening statement: "We contend that this then constituted a custom or practice on the part of the City over a period of years to eliminate people for their exercise of their rights of appeal and for whatever other reasons that existed. That then makes the City responsible." (R. 1-14). In the vocabulary of *Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986), plaintiff alleged that the City of St. Louis had a "fixed plan of action to be followed under similar circumstances consistently and over time," *Pembaur*, 89 L.Ed.2d at 463; or a "rule of general applicability." *Pembaur*, 89 L.Ed.2d at 475 (Powell, J., dissenting).

The next theory upon which liability was sought to be fixed upon the City was that expressed in Instruction 22, the confused verdict director (J.A. 118-119). This instruction will be discussed in more detail below; for now, it is sufficient to state merely that the basis for liability thus expressed was then, again in the vocabulary of *Pembaur*, "a course of action tailored to a particular situation," *Pembaur*, 89 L.Ed.2d at 463, namely, a decision to retaliate against a particular person - plaintiff. As stated, the Eighth Circuit imposed liability on yet another basis, that of the final authority theory. It is thus no surprise that this theory has now, in turn, been jettisoned. Plaintiff seeks to vindicate the jury's verdict on the "theory" upon which he claims the jury was instructed; and plaintiff's amicus, in sponsoring its own theory, brings the case full circle by urging respondeat superior liability.

We reply below to the contentions of both plaintiff and plaintiff's amicus. Before turning to those contentions, however, it is necessary to comment on plaintiff's statement of facts. Plaintiff offers the Court a fantastic tale in which no fewer than sixteen high level city officials conspired, over four years, to oust a midlevel bureaucrat from his employment with the City. Brief of Respondent, pp. 12-13. The Court will be aware of the inherent implausibility of this account, especially in its reliance on the notion that the officers of a new city administration would be animated by a desire to punish plaintiff for a civil service appeal he pursued against the administration that it had defeated. The Court will also note that the facts as they were rendered in the Eighth Circuit's sympathetic opinion affirming plaintiff's judgment bear only a slight resemblance to the wild story related in plaintiff's brief. What the Court may not be aware of is that plaintiff misrepresents and mistates the record in many specific instances. For example, plaintiff represents that the Director of Personnel testified that the Board of Estimate and Apportionment (comprised of the Mayor, Comptroller and President of the Board of Aldermen) made the decision to transfer plaintiff. Brief of Respondent, p. 21. In fact, the Director testified only that the Board could transfer functions of an appointing authority or department head (R. 2-180). There was never any indication in the record that the Board was involved in personnel decisions of city agencies. Plaintiff claims "Hamsher insisted the Mayor had personally ordered the transfer," Brief of Respondent, pp. 29 & 30, when Hamsher actually testified that he initiated the transfer and that Jackson, Nash and the Mayor did no more than approve it (R. 3-199-200). Another gross misrepresentation of the record occurs on pages 27 and 28 of plaintiff's brief. Plaintiff attempts to demonstrate that Patterson and Nash both denied that they made the decision to lay plaintiff off by pointing the finger at the other. The record reveals that Patterson's only involvement in Heritage was to approve its budget and that she did not participate in personnel decisions (R.3-59, 62). There are many other examples, and it would unduly lengthen this brief to bring each to the Court's attention. We ask the Court to exercise great caution in considering plaintiff's statement of the facts.

II.

The Error is Preserved

We dispute plaintiff's contention that consideration of the issue of whether judgment was properly entered against the City of St. Louis is one confined to review of the instructions for plain error, and the sufficiency of the evidence to support the verdict returned in response to those instructions.

"[T]he failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict." *City of Springfield v. Kibbe,* 480 U.S. ____, 94 L.Ed.2d 293, 301, 107 S. Ct. 1114, (1987) (O'Connor, J., dissenting); see also *Hanson v. Ford Motor Company,* 278 F.2d 586, 592-593 (8th Cir. 1960) (Blackmun, J.). Here, all of the defendants, including the City, filed a pre-trial Motion For Summary Judgment, or, in the Alternative, For Judgment on the Pleadings. Defendants argued as follows:

> "In the instant case, Plaintiff has failed to even allege the existence of any such policy. In fact, Plaintiff refers to City "policy" only in one instance in his complaint — at paragraph 29(c), wherein he claims the City's layoff policy (see Exhibit C) was *not* followed. In the absence of allegations of impermissible policy, or of facts indicative that such policy exists, the City, itself, may not be held liable."
>
> Memorandum in Support of Motion for Summary Judgment or, in the Alternative, for Judgment On the Pleadings, p. 16. (emphasis in original).

Defendants continued:

> "Thus, Defendant City of St. Louis would submit that summary judgment should be entered in its favor and against Plaintiff, as Plaintiff has failed to allege that his claimed deprivation of civil rights was the result of the execution of any official policy of the City of St. Louis." *Id.*

Without a doubt, the City was entitled to judgment on the pleadings: plaintiff's complaint failed to state a claim upon which relief could be granted because the "complaint lack[ed] an allegation regarding a required element necessary to obtain relief . . .", 2A Moore's Federal Practice ¶12.07[2.-5], namely, that plaintiff's injury was caused by a policy of the City. See *Henry v. Farmer City State Bank,* 808 F.2d 1228, 1237 (7th Cir. 1986) (complaint failing to allege the act was taken in furtherance of municipal policy properly dismissed). Thus, the view we urge now - that the judgment against the City was improper because there is no evidence of a city policy causing injury - was raised at the early stage of an attack upon plaintiff's pleading, and it is an issue before the Court completely apart from the error in the instruction.

Secondly, the City preserved the issue of whether there was evidence that a city policy had illicitly injured plaintiff by its Rule 50(a) motion for directed verdict at the close of plaintiff's case (R. 3-28); which motion was renewed at the close of all the evidence (R. 4-21-22); and which formed the foundation for the City's Rule 50(b) j.n.o.v. motion.

"The directed verdict is normally used in two overlapping categories of cases. First, where there is a complete absence of pleading or proof of an issue or issues material to the cause of action or defense. This is the situation that historically gave rise to the device of the directed verdict. Second, where there are no controverted issues of fact upon which reasonable men could differ." 5A Moore's Federal Practice ¶50.02[1]. "The motion for a directed verdict tests the legal sufficiency of the evidence to take the case to the jury; and thus raises a question of law." *Id.* at 50.03[2]. "The standards for granting a motion for judgment n.o.v., on which the constitutionally of such action depends, are the same as those governing the direction of a verdict." *Id.* at 50.07[2].

In the City's motions for directed verdict, and in its motion for judgment notwithstanding the verdict, the City contended, as it does now, that there was a complete absence of pleading and a complete absence of proof on an issue material to plaintiff's cause of action: that plaintiff had suffered a constitutional injury resulting from a decision made by a policymaker of the City of St. Louis acting within the scope of his policymaking authority. The question of law we raise here was thus raised in the district court by the appropriate techniques.

Thirdly, the City did complain of the instructions in a substantial and meaningful way. As plaintiff contends, Instructions 15 and 17 were offered by the City. However, those instructions were offered as part of a package that included Instruction No. A (J.A. 127) that would have required, as a prerequisite for the imposition of liability upon the city, a showing that "the alleged illegal conduct is both systematic and municipally supported." If Instruction A had been given to the jury along with Instruction 15, the vague formula in Instruction 15 allowing a verdict against the City for the acts of "high" officials would have been given the necessary definition: an official would have been "high enough in the government so that his or her actions can be said to represent a government decision" (Instruction 15) only when that person occupied a position high enough so that the official's conduct could be "systematic" (Instruction A); that is, an official is high enough only when he has the authority to make rules of general application. Though the articulation in the proposed instruction is somewhat different from the articulation in our brief in this Court, the position is essentially the same. These proposed instructions would certainly have required a finding for the City because there was no evidence that the City had a "systematic" policy of retaliation, or that Hamsher was an official high enough to make city-wide policy.

The policy issue is preserved, independent of whether the instructions are plain error.

III.

The Instructions Were Plain Error

Plaintiff spends the principal portion of his argument, Brief of Respondent, pp. 47-80, contending that the jury instructions were proper and that the verdict returned in response to them should be sustained. How ironic, then, is plaintiff's amicus' observation that "the jurors would have to have been logicians to comprehend the pertinent instructions as a whole (or, more precisely, to comprehend that the instructions were impenetrable)"! Brief of Respondent's Amicus, p. 26. Because plaintiff's amicus is right and plaintiff is wrong, the verdict cannot stand.

Plaintiff's attempt to vindicate the instructions is very carefully circumscribed. Plaintiff's defense is limited to Instructions 15 and 17, which have never been criticized by defendant, despite plaintiff's representation. The crucial instruction was Instruction 22, the verdict director on plaintiff's First Amendment claim, and that is the instruction we criticized in our opening brief.[1] See Brief of Petitioner, p. 33 n.12. That instruction commanded the jurors to return a verdict for the plaintiff if they found certain facts; and the instruction commanded the jurors to return a verdict in favor of the defendants if they found other facts. That critical instruction was illogical, it was inconsistent, it delegated to the jury the right to decide questions of law, and it omitted essential elements of a §1983 claim against municipalities. We will not repeat the discussion of the various deficiencies in Instruction 22 contained in our principal brief. Brief of Petitioner, pp. 32-33 n.12. Plaintiff makes no effort to respond to our argument, but instead seeks only to vindicate the "correctness" of that portion of Instruction No. 15 which states in the abstract that "a municipality may be held liable under 42 U.S.C. §1983 if the alleged unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision," (J.A. 113) repeated concretely in element 3 of the verdict director (Instruction 22) as "that defendants Hamsher, Patterson and Kindleberger are high government officials of the City of St. Louis with the right to make policy decisions and to speak for the defendant City of St. Louis." (J.A. 118). Thus, even if plaintiff's defense of Instruction 15 and, by implication, element 3 of Instruction 22 is successful, the undefended deficiencies remain.

However, neither instruction No. 15 nor instruction No. 22 is remotely adequate. It is undoubtedly true that municipalities *may* be held liable if the unconstitutional act is committed by an

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[1] The importance of verdict-directing instructions, and the necessity that such instructions be complete, is noted at 88 C.J.S. Trial §351. See also *Cabana v. Bullock*, 474 U.S. 376, 88 L.Ed.2d 704, 715 n.2, 106 S.Ct. 689. (1986), where the Court held that it is to be presumed that the jury heeds that instruction which is "more comprehensive and more specifically tied to the facts presented to the jury." Here, Instruction 22 was the comprehensive instruction which specifically tied the facts presented to the abstraction set forth in Instruction 15.

official high enough in the government so that his action may be fairly said to represent a governmental decision. It is no doubt true the city *may* be held liable for decisions of those with the right to speak for the city, for a city may be held liable "where action is directed by those who establish government policy . . ." *Pembaur*, 89 L.Ed.2d at 464. But who has the right to establish government policy and when does he do so? The sharp division of opinion on this Court demonstrates just how difficult it is to answer these questions. Since "whether an official has final policymaking authority is a question of state law"; *Pembaur*, 89 L.Ed.2d at 465, the court must instruct the jury as to whom the policymakers are. And certainly, then, another panel of the Eighth Circuit, in another §1983 case, correctly ruled that an instruction providing a definition of "official policy" is necessary for "policy" is a term not readily understandable by jurors. *Westborough Mall, Inc. v. City of Cape Girardeau*, 794 F.2d 330, 337-339 (8th Cir. 1986). The reason why it is necessary becomes apparent when we recall the function instructions play in our system of justice. "It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of the trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law." *Pleasants v. Fant*, 89 U.S. 116, 121-122 (1875). Proper jury instructions give no latitude for the jury to interpret the law, and instructions which allow a jury to make an unguided determination on an issue that determines liability are erroneous. *Monitor Patriot Co. v. Ray*, 401 U.S. 265, 277 (1971).

In the case at bar, the jury was not provided with rules of law which they could apply in considering whether a city policy inflicted a constitutional injury upon plaintiff, the instructions were not clear, it cannot be supposed that the jury followed such rules, and the result is that the verdict makes little sense. Rather, the jurors exercised the roving commission which they had been given to make an unguided determination as to whether an official who was "high enough" was sufficiently engaged so as to make it "fair" that the City be held liable. But, while everybody agrees that cities should be held liable only when it is fair to do so, there are many different views of what is fair in this context. By not instructing the jury as to what the law considers fair, the trial judge failed to protect the parties from jurors left to grope in the dark for principles of law they were not equipped to find.

As we have urged, the district court's errors in not granting the City's motions for directed verdict and for judgment notwithstanding the verdict require reversal for the evidence did not meet the standard the law requires for imposing liability upon a city. However, even if plaintiff is correct and the instructions are the "law of the case," the judgment must be reversed. Had the court's error in giving Instruction 22 been less egregious, there might be an important issue as to whether the Court's review should be confined to a "plain error" standard, or whether a less fettered review would be in order. See *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 255-258 (1981). If so, we would urge that unrestricted review is appropriate because of the current "state of evolving definition and uncertainty" *id.;* because the "question is also important and likely to recur in § 1983 litigation" *id;* and because of the rejected instructions that we proffered. But it does not really matter here, for instructions which are "impenetrable", as we argue, and plaintiff's amicus admits, surely meet the plain error standard that reaches "obvious instances of injustice or misapplied law." *Id.* See also *Pipefitters v. United States,* 407 U.S. 385 (1972) (judgment reversed on basis that instructions omitting essential element constituted plain error).

IV.

The Ultimate Authority Theory Is Not Inconsistent With Monell

We reply briefly to the principal arguments put forward by plaintiff and by plaintiff's amicus against the ultimate authority theory that we urged in our principal brief is the correct analysis by which issues of municipal liability are considered.

a. Plaintiff contends that the ultimate authority doctrine is inconsistent with *Monell* and with *Pembaur*. Brief of Respondent, pp. 59-62. It is not. It may very well be that the unconstitutional rule in *Monell* was not a rule promulgated by an ultimate authority. However, the defendant in *Monell* admitted that it had a city-wide policy of compulsory maternity leave, *Monell v. Dept. of Social Services,* 436 U.S. 658, 661 n.2 (1978); in any case, there is little doubt that the rule, even if not promulgated by an ultimate authority, was an open and notorious one known to the ultimate authority. As we explained in our main brief, the ultimate policymaker's "tolerance of the custom is his [the ultimate authority's] policy, and his policy is the county's policy for which it might properly be held liable". Brief for the Petitioner, p. 27. This is also the response to plaintiff's complaint that "none of the policies, rules and regulations adopted by city agencies would, on petitioner's view, constitute official policies," Brief of Respondent, p. 63. Even though not always directly promulgated by ultimate authorities, such formal policies would, almost by definition, be sufficiently notorious that the ultimate authority's tolerance of the rules would be city policy.

Likewise, *Pembaur* is completely consistent with the position we advocate. The prosecutor in *Pembaur* was an ultimate authority, not because he had the authority to discipline sheriff's deputies who did not follow his instructions, but because the Court, showing "great deference to the interpretation of state law by the courts of appeals," *Pembaur* 89

L.Ed.2d at 466 n.13, believed that the prosecutor had the authority to "instruct" and "command" the deputies under the pertinent Ohio statute. *Pembaur*, 89 L.Ed.2d at 466.

b. Plaintiff conjures up a scheme whereby ultimate authorities will delegate all of their authority in a deliberate scheme to protect their cities from §1983 exposure. Brief of Respondent, pp. 62-63. Certainly, city officials may wish to limit their governments' exposure to §1983 liability, but they have many other competing considerations in conducting local government which are more compelling. The likelihood that officials would abdicate their power to make decisions solely with a view to minimizing their cities' exposure to §1983 liability is as likely as states abolishing local units of government in favor of governing directly so as to make maximum use of the Eleventh Amendment bar. The argument betrays a complete lack of realism.

c. Plaintiff claims that "Petitioner asserts, finally that a city can never be held liable under *Monell* if the municipality had in effect a rule prohibiting the constitutional violation at issue," Brief of Respondent, p.69, and argues that the existence of such a rule should not immunize a city. *Id.* pp. 69-80. Plaintiff's amicus makes a similar criticism. Brief of AFL-CIO, pp. 21-23. These arguments misconceive our point: We do not contend that the mere adoption of a written rule prohibiting the constitutional violation at issue immunizes the city; rather, we contend that the adoption of a *policy* forbidding the constitutional violation at issue immunizes the city. The distinction, of course, is that the City's policy (decisions made by ultimate authority)— may vary from the written rule, which might be nothing more than a subterfuge or a dead letter. We agree with plaintiff's argument that the formal or explicit rule is nothing more than evidence of the policy, which the fact-finder may or may not find persuasive, and which the fact-finder may or may not find outweighed by other evidence tending to show that the policy of the city policymakers actually was something different.

However, in the present context, there was no evidence (contrary to plaintiff's prediction, R. 1-14), other than the single case involving plaintiff, that tended to show that the City's formal policy[2] of non-retaliation was belied by an actual practice to the contrary. And we know from *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) that a reasonable inference cannot be drawn from this single incident that the city had a rule of general application favoring retaliation based on plaintiff's case alone.

If a city's rule forbidding the constitutional violation at issue does, in fact, establish or reflect the city's policy regarding such violations, the city is not liable because its policy has not caused the violation. If the city's rule forbidding the constitutional violation issue does not, in fact, establish or reflect the city's policy, the city may be held liable if the city's true policy is the moving force causing the constitutional injury.

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[2] Plaintiff's amicus claims to doubt that the City's charter forbids supervisors to retaliate against employees for filing appeals to the Civil Service Commission. Brief, AFL-CIO, p. 22-23. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) the Court held that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, for to do so "would allow the government to produce a result which [it] could not command directly." This common sense cannon of construction is equally applicable here: If the City of St. Louis could punish an employee for filing a civil service appeal, it would be allowed to produce a result which it could not command directly, *viz.*, prevention of employees from filing appeals with the Civil Service Commission. Plaintiff's amicus also doubts that it is self-evident that an employee's criticism of his superiors could be deemed to bear on his merit and fitness, citing *Pickering v. Board of Education*, 391 U.S. 563, 570 n.3 (1968). Brief of AFl-CIO, p. 22. Indeed, it is not self-evident. The point we make, however, is that it is self-evident that making use of a civil service appeals process cannot be deemed to bear on the employee's fitness and merit within the scope of a charter that provides for a civil service appeal system, something not hypothesized in the *Pickering* footnote. This point is affirmed by the testimony of the City's Director of Personnel, the chief administrator of the City's civil service system (J.A. 64-68), that retaliatory personnel decisions are improper (R.3-117).

V.

There Is No Evidence That A City Policymaker Caused An Injury To Plaintiff's Constitutional Rights

In Part III of his argument plaintiff contends that the evidence was sufficient to support the verdict. As we have argued, the instructions failed to sufficiently define the key element of the City's liability. That deficiency makes it difficult to fruitfully discuss the sufficiency of the evidence to support the verdict required by the instructions as is demonstrated by plaintiff's limiting his discussion of the relevant evidence, which he contends is the central issue on appeal, to 7 pages (Brief of Respondent, pp. 96-103) of a 109-page brief. In any case, plaintiff entirely misrepresents the evidence as to the function that the Civil Service Commission plays in the City of St. Louis, something that the use of ellipses allows him. Article XVIII, §7(d) of the Charter, upon which plaintiff places such reliance (Brief of Respondent, p. 99), provides in full as follows:

> (h) **Limitations.** *Except as provided in this section,* the commision shall have no administrative powers or duties. *Except as so provided,* it shall have no power to direct or control any employee of the department of personnel or other employee of the city, or the action to be taken by any of them in any matter or case. Neither the commission nor any of its members shall have power to take any action except by majority vote in meeting asembled. (J.A. 64)

We have italicized the critical portions plaintiff deleted because the exceptions are so important. In particular, section seven provides that "[t]he commission shall have the power, and it shall be its duty: to prescribe, and to amend from time to time as such action is deemed to be desirable, rules for the administration and enforcement of the provisions of this article and of any ordinance adopted in pursuance thereof, and not inconsistent therewith;" (J.A. 62)

The scope that these rules must encompass are set forth in subsections (a) through (w) of Section 3, and is broad indeed (J.A. 50-57). And the evidence is that the Commission has promulgated the requisite rules for the administration of the system (Defendant's Exhibit BBBB-4; R. 3-77). And, contrary to the contention of plaintiff's amicus, Brief of AFL-CIO, pp. 18-20, and of plaintiff, Brief of Respondent, p. 99-100, the rules so adopted establish substantive policies. Among other things, the rules define actions that may be the basis for discipline (Defendant's Exhibit BBBB-4; pp. 39-40; R. 3-77), forbid discrimination in employment (id. p. 57), forbid retaliation for complaints of discrimination (id.), and forbid sexual harassment (id.). Employment decisions, including transfers, that violate these substantive rules are unlawful. See *Bates v. City of St. Louis,* 728 S.W.2d 232, 235 (Mo. App. 1987) (transfer in violation of civil service rule set aside). The Commission does make employment policy; certain employment policies are also made jointly by the Commission, the Board of Aldermen and the Mayor (J.A. 62-63); but no employment policies are made by the director of the community development agency. The Missouri Supreme Court has accurately described the duties of the Civil Service Commission as "mainly quasi-legislative or judicial." *Kirby v. Nolte,* 164 S.W.2d 1, 9 (Mo. banc 1942). As a quasi-legislative body the Commission establishes the rules; as a quasi-judicial body the Commission determines whether the rules have been violated.

The proper understanding of the role of the Civil Service Commission exposes the defect in the efforts of plaintiff's amicus (Brief of AFL-CIO, pp. 20-21) to deal with discussion in part II-B of Justice Brennan's opinion in *Pembaur* where Justice Brennan distinguishes between granting an employee discretion in the exercise of a function, and the delegating to that employee the power to establish policy. An employee exercises discretion when he makes decisions; an employee makes a policy when he establishes criteria by which decisions are made. That is, an employee is delegated final authority to establish municipal policy only when he is given the authority to establish rules of general application. Nobody gave Frank Hamsher, or any other defendant, the authority to establish the criteria according to which city employment decisions are to be made. In particular, nobody told Frank Hamsher that he could establish city policy on retaliation or on transfers. The criteria for making personnel decisions are set forth, in the first instance, in the City Charter; and they are set forth, within the scope of the Charter, in the rules of the Civil Service Commission.

There was no evidence that Frank Hamsher, or any other city official who plaintiff claimed participated in either the transfer or the layoff decision, and who was impermissibly motivated, was delegated the power to make final employment policy on behalf of the City of St. Louis.

VI.

The Verdicts Are Inconsistent

In the second point presented we contended that the verdicts exonerating the individual defendants are inconsistent with the verdict against the City of St. Louis, just as the verdict exonerating the individual defendant in *City of Los Angeles v. Heller,* 475 U.S. ____, 89 L.Ed.2d 806, 106 S.Ct. 1571 (1986) precluded a verdict against the City of Los Angeles. We argued that the Eighth Circuit's technique for evading *Heller* — making an inference that the jury's verdict exonerating Frank Hamsher, whom the court believed to have been the policymaker, reflected a jury finding that Hamsher did not directly cause plaintiff's injury[3] — was error because the principles of proximate causation applicable to individual defendants are not different

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[3] The Eighth Circuit relegated the issue to a footnote where it explained that "[t]he failure of the jury to find the individual named defendants responsible for Praprotnik's damages can be justified by the fact that the named defendants were not the supervisors directly causing the layoff, when the actual damages arose." *Praprotnik,* 798 F.2d at 1173, n.3.

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from those applicable to municipal corporations. Just as he did in response to the first issue raised, plaintiff makes no effort to defend the opinion of the Eighth Circuit in his advocacy of the consistency of the verdicts. What is new, however, is that the plaintiff abandons not only the Eighth Circuit, but also the Seventh Amendment, and the instructions.

Plaintiff argued in connection with the first issue presented that "[a]ny appellate attempt to make . . . a *de novo* determination regarding municipal liability would ordinarily run afoul of the Seventh Amendment." Brief of Respondent p. 42. Thus, "the court is not free to substitute its own evaluation of the evidence for that of the jury." *Id.* p. 47. Now, however, the verdicts are not deemed to be a response to the district court's instructions, but rather a response to the closing arguments! *Id.* p. 104. Based on the evidence and the closing arguments, plaintiff speculates that the verdict against the City may have been predicated on either of two theories: (1) "that the unconstitutionally motivated act was assigning Praprotnik such menial tasks that a layoff was inevitable," *Id.* p. 105; or (2) that "[t]he jury could have of course exonerated Hamsher and the other named defendants if it believed another official had in reality made the improperly motivated layoff." *Id.* at 106.

Plaintiff's argument is wrong, first of all, because it ignores the fundamental principle that "it is the duty of the jury to follow the law, as laid down by the court." *Herron v. Southern Pacific Company,* 283 U.S. 91, 95 (1931) *citing* Justice Story in *United States v. Balliste,* 2 Summ. 240, 243, Fed. Cas. No. 14545. "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies the law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." *Paoli v. United States,* 352 U.S. 232, 242 (1957). As this Court does not speculate that the jury does not follow the instructions of the court, *Graham v. United States,* 231 U.S. 474, 481 (1913), neither can the plaintiff here speculate that the jury did not do its duty in order to vindicate the verdicts.

The jury was not told that it could return a verdict against the city based upon the assignment to plaintiff of menial duties; rather, the jury was instructed that liability was to be based upon the "decision to transfer and lay plaintiff off" (J.A. 118). Nor was the jury told that the City could be held liable if officials other than the defendants "made" the layoff; rather, the jury was told that the City could be held liable if "defendants Hamsher, Patterson and Kindleberger are high government officials of the City of St. Louis with the right to make policy decisions and to speak for the defendant City of St. Louis" (Id.) If the jury returned its verdict against the City based either upon Jackson's assignment of menial duties to plaintiff, or upon a layoff decision made by persons other than Hamsher, Patterson, and Kindleberger, the jury did not follow the instructions, and the judgment must be reversed.

Secondly, even if the jury's verdict could be sustained on the theory that the verdict was responsive to plaintiff's closing argument rather than to the court's instructions, plaintiff's argument fails because it is predicated on a characterization of his case in general, and his closing argument in particular, that is false. Plaintiff states that he argued that the City could be held liable even if the individual defendants were not believed to be guilty of misconduct. Once again, plaintiff relies upon a none too scrupulous use of ellipses. The complete passage from which plaintiff quotes is as follows:

> But she [counsel for defendants] said we didn't sue enough people. Well maybe we didn't, but *I think we got the ones that are primarily responsible. I'm talking about Mr. Hamsher and Mr. Kindleberger. They're sitting over there. And I think we got the right ones. And* we brought the ones we felt had mistreated Mr. Praprotnik.

> Now, she says maybe there are other high officials we should have brought in; that's why we sued the City of St. Louis. If other high officials did this to him, then the City is responsible. *If Mr. Hamsher and Mr. Kindleberger did it, the City is responsible, if they did it, the City is responsible, if they did it pursuant to a policy, custom or usage.*
>
> R. 4-56

The portions of plaintiff's closing argument that he replaced by ellipses, or otherwise excised from the passage as he quoted it in his brief, are italicized. The restoration of the missing portions make it clear that plaintiff's theory of the case, as espoused in his closing argument, was fully consistent with the instructions given the jury — liability was to be imposed upon the city for a decision made by three persons: Hamsher, Patterson, and Kindleberger.

b. The jury's verdicts are inconsistent. The jury was instructed that its "verdict must be for the plaintiff James Praprotnik and against the defendants" if it found that each of six propositions were true (J.A. 118). If we believe that the jury followed that instruction, the verdict in favor of plaintiff and against defendant City of St. Louis necessarily means that the jury believed each of the six propositions was true. Yet if we believe that the jury followed that instruction, the verdicts against plaintiff and in favor of each of the individual defendants necessarily mean that the jury believed that at least one of the six propositions was not true. Similarly, the jury was instructed that their "verdict must be for the defendants and against the plaintiff" if the jury believed that each of three other propositions was true (J.A. 119). Thus, the verdicts in favor of the individuals necessarily means that the jury believed that all three of these propositions were true; and the verdict against the City necessarily mean that the jury believed that at least one of the three propositions was not true.

c. The verdicts, then, are inconsistent. The only question that remains is the remedy. Normally inconsistent verdicts require resubmission of the verdicts to the jury or a new trial. Plaintiff's amicus asserts that a new trial is required here, arguing that *Heller* does not control for the trial in the case at bar was not bifurcated as in *Heller*. Brief of AFL-CIO, p. 26. To the contrary: plaintiff's decision not to appeal the judgments exonerating the individual defendants has allowed those judgments to become final, and there can be no retrial of plaintiff's case against them. Therefore, the posture is analogous to that in *Heller*, except that here it is the persons whom plaintiff nominated as the policymakers (Hamsher, Patterson, and Kindleberger) who have been exonerated, while in *Heller* it was the actor who was exonerated. In both cases, a final judgment exonerating the individuals upon whom the liability of the city depends was entered before the issue of the liability of the city was finally considered. In both cases, the rule that "if the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel . . ." is dispositive. See *Portland Gold Mining Co. v. Stratton's Independence*, 158 F.63, 68-69 (8th Cir. 1907) (Van Devanter, J.), cited with approval in *Bigelow v. Old Dominion Copper Mining & Smelting Company*, 225 U.S. 111, 127-128 (1912); and *Buckeye Powder Co. v. Dupont DeNemours Powder Co.*, 248 U.S. 55, 62 (1918).[4] Since the liability of the city necessarily depends upon the culpability of its policymakers, and since the policymakers have been exonerated by final judgments in their favor, that judgment bars plaintiff from litigating his claim against the City in a new trial.

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[4] See also *New Orleans & Northeastern R.R. Co. v. Jopes*, 142 U.S. 18, 24, 27 (1891); *Carroll v. Hubay*, 272 F.2d 767, 769 (2nd Cir. 1959) (Hand, L., J.); and *Jordan v. Medley*, 711 F.2d 211, 217 (D.C. Cir. 1983) (Scalia, J.).

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 86-772 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,
Petitioner,
v.
JAMES PRAPROTNIK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a municipality is liable under 42 U.S.C. § 1983 for the unconstitutional actions of its agents solely because they act within the scope of delegated authority and their actions are not subject to further *de novo* review by an official of the municipality?

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In The
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October Term, 1986

No. 86-772

City of St. Louis,
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v.
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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case concerns the definition of "policy" that will expose a City to liability under 42 U.S.C. § 1983 for unconstitutional actions of its officials. A divided panel of the Eighth Circuit affirmed a jury verdict awarding damages against the City for alleged improper retaliation against respondent for the exercise of his First Amendment rights. The court of appeals held the City liable for the acts of supervisory employees because those acts fell within their discretionary authority. The court failed to undertake the further inquiry, mandated by this Court's decisions, whether those officials were acting to implement a policy established by the City, or whether they were themselves authorized to make personnel policy for the City.

Amici are concerned that the sweeping definition of "policy" in the decision below will subject municipalities to suit by countless employees or citizens who believe they have been injured by acts of officials who have some discretionary authority, even though they lack the authority to set the policy governing these acts. Specifically, the court held that a City is liable if discretionary acts of supervisory employees within the scope of their authority violate a subordinate's constitutional rights. This standard does no more than restate the very theory of *respondeat superior* that this Court has repeatedly rejected as a basis for liability under Section 1983.

The theory applied by the court of appeals will not only result in an expansion of actual liability under Section 1983, but will also undermine the ability of local governments to manage properly the public business, particularly with respect to personnel matters involving their employees. Under the Eighth Circuit's theory, virtually every decision by a supervisor that affects a municipal employee could become the "policy" of the local government.

Amici believe that this case presents an opportunity for the Court to further clarify the definition of municipal "policy" and "custom" that will impose liability on a City under Section 1983 for the actions of its officials. Uncertain standards of Section 1983 responsibility expose municipalities to a flood of litigation instituted on the chance that claims can be brought within the penumbra of "municipal policy." The potentially heavy financial penalties stemming from such litigation disrupt local budgeting and planning. Attempts to contain liability by establishing clear lines of official authority and responsibility are threatened by decisions, such as the one below, that leave local governments helpless to avoid actions that may subject them to substantial damage awards.

Amici submit that the decision below is wrong. Because this Court's decision will have a direct impact on matters of importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt petitioner's statement of the case and would emphasize the following facts.

Between 1968 and 1983, respondent, James Praprotnik, was an employee of petitioner, the City of St. Louis. In 1980, respondent held a management position as an architect in the Community Development Agency ("CDA"). At that time, he became involved in a dispute with his supervisors over his failure to obtain permission before performing architectural work for private clients. As a result of this dispute, respondent was suspended from his job for 15 days by his immediate supervisor. On respondent's appeal, the City Civil Service Commission ("Commission") reprimanded respondent, but set aside the suspension and ordered him reinstated with back pay. Appendix to Petition for Certiorari (Pet. App.) A-2.

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

After the dispute, a previously recommended superior performance rating was reduced to "good," and accompanied by a recommendation for a two-step decrease in salary level. Pet. App. A-2. Again, respondent appealed, and the Commission reduced the decrease in his salary level. Pet. App. A-3. In 1981, respondent was rated "inadequate" in "relationships" on his annual review. *Ibid.* On his appeal, that rating was raised by the Commission to "adequate." *Ibid.*

In the spring of 1982, the City was forced to make major staff and budget reductions; respondent was transferred to a new position, equivalent to his CDA position, at the City's Heritage and Urban Design Division ("H&UD"). *Ibid.* Respondent objected to the transfer and appealed this job action. Pet. App. A-4. The Commission declined to hear the appeal on the ground that respondent had lost nothing by the action because it was a lateral transfer that preserved his grade and salary. *Ibid.*

Respondent then filed this lawsuit, alleging that the transfer was retaliatory for his appeal of the original job suspension, and violated both his First Amendment rights and his due process rights. Pet. App. A-5 to A-6 n.1. After the transfer, respondent's duties were substantially changed, as his supervisor took over his architectural work. Pet. App. A-4. He was then found "overqualified" for the duties he was performing, rated "inadequate" overall, and recommended for reclassification and a salary decrease. *Ibid.* On his appeal, the Commission raised the rating to "adequate" and reversed the pay reduction recommendation. *Ibid.*

In December 1983, respondent received notice that he would be laid off. *Ibid.* The director characterized the layoff as a "minor reorganization" which did not require any discussion with higher officials. *Ibid.* According to testimony, such reorganizations are appropriate

when there is "a lack of work or a lack of funds within [the] agency." Pet. App. A-5. Respondent's superior also cited respondent's job performance as justification for the layoff. *Ibid.* Respondent appealed the layoff to the Civil Service Commission, which has stayed the appeal pending resolution of this lawsuit. Pet. App. A-6 n.1.

Respondent then amended his complaint to add the layoff as an additional violation. Pet. App. A-6 n.1. Respondent claimed that his transfer and eventual layoff were in retaliation for his challenge to his original suspension. He asserted that these adverse employment actions violated (1) his First Amendment rights to pursue his appeal from the suspension and (2) his due process rights. The jury returned a special verdict, exonerating each of the individual supervisors named in the complaint, but awarding respondent damages against the City of $15,000 each on his First Amendment and due process claims. A divided court of appeals affirmed the award on the First Amendment claim, but reversed on the due process claim.

The majority below articulated a two-part test for determining whether the conduct of the officials responsible for the transfer and eventual layoff could be attributed to a municipal "custom or policy" so as to subject the City to liability. According to the Eighth Circuit, the City could be held liable if: (1) the relevant officials possessed delegated authority either by custom or policy, directly or indirectly, to act on the City's behalf; *and* (2) the acts of the relevant officials were "final," *i.e.*, not subject to *de novo* appeal.[2] Pet. App.

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[2] In ruling that the City could be held liable notwithstanding the exoneration of all of the individual defendants, the court distinguished the decision in *City of Los Angeles v. Heller*, 106 S.Ct. 1571 (1986), on the ground that two supervisors other than the named defendants had implemented City policy in the lawoff.

A-8. Because respondent's supervisors had discretionary authority to initiate transfers and layoffs, the court found that they were acting on behalf of the City, thereby satisfying the first prong of the test.

With respect to the requirement of finality, the court acknowledged that review by the Civil Service Commission was available. However, because such an "appeal is decided solely on the basis of written submissions," a procedure "indicative of a highly circumscribed scope of review," the court concluded that "final authority for a layoff may fairly be said to rest with the initiating supervisor." Pet. App. A-11. The court concluded that "[t]he jury thus had sufficient evidence from which to conclude that the City may be subject to liability for the supervisor's acts." *Ibid.*

Judge Ross dissented. Pet. App. A-20 to A-25. He argued that there was no evidence the City had a *policy* of retaliating against employees who exercised their First Amendment rights by appealing personnel decisions. Pet. App. A-22. Instead, respondent's claim was based entirely on his own experience and the isolated actions of his supervisors. Moreover, the City Charter and the Civil Service Commission rules made clear that, while respondent's supervisors had some discretion in making certain personnel decisions, they had no authority to set City personnel *policy*. *Ibid.* at A-23. The dissent concluded that respondent's *four* successful appeals to the Civil Service Commission undermined completely any claim that respondent's supervisors exercised "final authority" in City personnel matters. *Ibid.*

We assume that, if all the actors who could have caused the deprivation of respondent's rights had been exculpated of any unconstitutional conduct, the court would have reversed the judgment against the City. Obviously, a City cannot be held liable if no prohibited conduct occurred.

Amici will not further address the issue of the effect of the exoneration of the individual named defendants, but note that the concept of retaliation includes an element of motivation, and that motivation can exist only in the mind of an individual or individuals.

The only issue before this Court is whether the conduct of the City's employees which allegedly caused the violation of respondent's First Amendment rights may properly be attributed to a "custom or policy" of the City as required by the standards for municipal liability under Section 1983 enunciated in *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

SUMMARY OF ARGUMENT

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court set forth the basic standard for imposing municipal liability under Section 1983. The Court held that a City could be held liable only for *its own acts*. Accordingly, municipal liability can be imposed if the unconstitutional act in question occurs pursuant to (1) municipal "policy" or (2) a consistent municipal "custom or practice." Liability on the basis of *respondeat superior* is specifically precluded. *Monell*, 436 U.S. at 691-93.

Under the test for determining whether a particular action or decision represents municipal "policy," a City may be held liable for a decision or act of general application decided upon by a policymaker. *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1298-99 (1986). A City may also be held liable for unconstitutional acts taken pursuant to a *process* that may fairly be said to represent city policy, such as a vote by a city council to deprive a single individual of constitutional rights. *See Owen v. City of Independence*, 445 U.S. 622 (1980). Respondent has put forth—and the court below found—no evidence which would show that the City of St. Louis has a generalized policy of retaliating against employees who exercise their First Amendment rights. Indeed, the notion that a City would have such an explicit and generalized policy of retaliation is inherently improbable.

Cf. City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985). Respondent cites no municipal ordinance or order from the Mayor or the City's personnel director supporting the existence of such a policy. Instead, this case arose from a single series of job actions by one set of City supervisors clearly not exercising policymaking authority on behalf of the City.

The fact that the City established the Civil Service Commission to insulate individual employees from their supervisors demonstrates that the policy of the City is not to retaliate against the exercise of First Amendment rights. On the contrary, the City attempts to protect employees from retaliation, as respondent's four successful appeals attest.

The court below applied a wholly incorrect test for determining municipal responsibility under Section 1983. Specifically, the court of appeals held that if an official's actions were (1) within the official's delegated authority and (2) not subject to *de novo* review, the official could be considered to be acting pursuant to municipal "policy" for purposes of Section 1983.

Imposing municipal liability in those situations where a supervisor acts within an area of delegated authority is nothing more than *respondeat superior* liability. *Pembaur*, 106 S. Ct. at 1300. The requirement that the act in question must be "final" adds nothing to the test. The Eighth Circuit's rule thus improperly expands the potential liability of Cities beyond anything Congress intended; it also undermines municipal decisionmaking processes by making it virtually impossible for local governments to avoid potential civil rights claims through use of reasonable measures of control over public employees' conduct. Moreover, even if the "finality" test were appropriate, it is the Civil Service Commission that in fact exercises "final" authority, and thus the decisions about which respondent complains do not satisfy even the Eighth Circuit's test for municipal responsibility.

In addition to failing to provide any evidence to satisfy the policy test for municipal liability, respondent similarly has failed to demonstrate a City *custom* of depriving employees of constitutional rights. Under the custom standard, respondent must demonstrate (1) a common or widespread practice violative of constitutional rights; and (2) constructive or actual knowledge of the practice by City officials. A single incident cannot create an inference that a widespread practice exists. *Tuttle*, 105 S. Ct. at 2436, *City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1115 (1987). Respondent in this case has presented no evidence of any conduct beyond that of his own experience. Moreover, there is no evidence that the relevant policymaking officials knew or should have known about respondent's situation, much less about any alleged practice of supervisory retaliation against the exercise of First Amendment rights by the City's employees.

ARGUMENT

THE STANDARDS OF DISCRETION AND FINALITY EMPLOYED BY THE COURT OF APPEALS ARE INCONSISTENT WITH THE PRINCIPLES ESTABLISHED BY THIS COURT FOR DETERMINING MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978). this Court reversed its previous decision in *Monroe . Pape*, 365 U.S. 167 (1961), and concluded that municipal governments are "persons" subject to liability under 42 U.S.C. § 1983. *Monell*, 436 U.S. at 690. Upon reviewing the legislative history of the Civil Rights Act of 1871, the predecessor of Section 1983, the Court further concluded that Congress intended municipal governments to be held liable only for *their own* unconstitutional acts and not upon a theory of *respondeat superior*. 436 U.S. at 691-694. The Court made plain that it is only

> "when execution of a government's policy or custom, whether made by its lawmakers or by those

> whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."

436 U.S. at 694. Thus, the Court held that municipal liability under that provision may be imposed only if the unconstitutional act in question occurred pursuant to (1) municipal policy or (2) a consistent municipal custom or practice.[3] *Ibid.*

As this Court has stated, municipal liability is only appropriate if the City itself, as opposed to its agents and employees, can fairly be said to be "responsible" for the constitutional injury. *Monell*, 436 U.S. at 694. This rule of limited liability is faithful to the holding in *Monell* that Congress intended to restrict liability of local governments for the acts of their employees. In so doing, Congress has not left injured parties without remedies; they still have available both a federal civil rights cause of action under Section 1983 and a state tort cause of action against the *municipal employees* who actually violated their rights. As this case demonstrates, employees may also have administrative remedies, such as review by a civil service commission. *See* page 6 *supra*. Thus, *Monell* found that Section 1983 reflects a reasonable compromise between the need to compensate for constitutional harms and the need to protect municipalities from damage claims whenever a governmental employee inflicts constitutional injury.[4] The court of appeals has altered that balance in a way that conflicts with *Monell*.

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[3] *See also Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986); *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985); *City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1117 (1987) (O'Connor, J., dissenting).

[4] *See Monell*, 436 U.S. at 693-94 (refusing to impose municipal liability for employee constitutional torts under "insurance theory").

A. The Actions Of Respondent's Supervisors Did Not Establish Or Implement A City Policy Of Retaliation Against Employees Exercising Their Constitutional Rights.

The test for determining whether a particular action or decision represents municipal policy may focus on (1) the *nature* of the action or decision, *i.e.*, whether the decision is one of general application; or (2) the *identity* or *status* of the municipal officer or entity who makes the decision or initiates the action, *i.e.*, whether the official or entity "speaks for" the municipality. A City may be held liable for a single unconstitutional act if that act constitutes—or is taken pursuant to—a *rule of general application*. As the Court noted in *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1299 (1986), the term "policy" often refers to rules that are "intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time."

In the absence of a rule of general application, the proof of a municipal "policy" depends upon the status or identity of the person who sets in motion the particular action causing the constitutional harm so that it may be attributed to the City itself. In *Pembaur*, the majority recognized that a definition of municipal policy solely as a rule of general application would, in certain circumstances, be too limited.[5] 106 S. Ct. at 1298-1299. On some occasions, government will choose "a course of action tailored to a particular situation and not intended to control decisions in later situations." *Ibid.* at 1299. If, on those occasions, a decision of specific application is properly made "by that government's authorized decisionmakers" in the area in question, the City may be held liable for that decision. *Ibid.* Thus, for example, when an individual is terminated by city council resolution, it is appropriate to hold the City responsible for that termination. In such circumstances the process and the status of the decisionmaker, rather than the generally applicable nature of the decision, make it a matter of city policy for purposes of Section 1983. *See Owen v. City of Independence*, 445 U.S. 622 (1980).[6]

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[5] Justice Powell, dissenting in *Pembaur*, similarly defined a policy in part by the nature of the decision made, 106 S.Ct. at 1309 ("most policies embody a rule of general applicability"), but would also permit proof of municipal policy in the absence of a rule of general application. According to Justice Powell, proof of municipal policy turns not only on the nature of the decision, *i.e.*, one that is of general application, but also on the *process* by which the decision was made or the action was taken. A decision developed through a *process* involving formal municipal decisionmakers, such as a city council, may properly be found to represent city policy, even if the decision does not establish a rule of general application. 106 S. Ct. at 1309.

Under these standards, the *first* issue is whether the unconstitutional action in question was undertaken pursuant to a rule of general applicability. This Court has indicated the importance of common sense in determining what constitutes municipal "policy." In this case, respondent's theory of municipal liability—that the City of St. Louis has a generalized policy of retaliating against employees who exercise their First Amendment rights—is inherently improbable.[7] Common sense suggests that few Cities would adopt a policy of encouraging supervisors to take such action against employees at the supervisors' discretion. *Cf. Tuttle*, 105 S. Ct. at 2436 (it is "difficult in one sense even to accept the submission that [a city] pursues a 'policy' of 'inadequate training', unless evidence be adduced which proves that the . . . policymakers deliberately chose [an inadequate program]").

Respondent cites no municipal ordinance or order from the mayor or the City's personnel director supporting the existence of such a policy. Yet, in matters of employment *policy*, such city officials are the most appropriate sources of evidence concerning the City's general approach to various issues. *See* Pet. App. A-22 (mayor, aldermen and Civil Service Commission have power to establish general personnel policy); *see also Monell*, 436 U.S. at 690 (policy is statement, regulation or decision "officially adopted and promulgated by [municipal] officers").

The existence and operation of the Civil Service Commission in this case demonstrate clearly that the City has recognized that individual supervisors might not act with complete dispassion toward those who work for them; in some circumstances, supervisors might retaliate against employees for actions protected by the Constitution. To insulate individual employees from their supervisors, the City created a Civil Service Commission so that adverse employment actions could be reviewed by an independent body. Indeed, in this case, the fact that respondent prevailed on four appeals to the Commission demonstrates that the policy of the City to protect municipal employees operated effectively. Even if the Commission was ultimately ineffective in preventing the loss of respondent's job—which is far from clear since the Commission proceeding has been stayed during the pendency of this law suit—the very existence of civil service rights, and of a Commission to enforce those rights, undermines any finding of a municipal policy of retaliation.

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[6] *See also Pembaur*, 106 S. Ct. at 1309 (Powell, J., dissenting) (focusing on the "nature of the decision" and the "process by which the decision at issue was reached" as the factors to be used in distinguishing municipal policy from *ad hoc* decisions of individual municipal actors).

[7] Indeed, respondent's theory of the case requires more than simple proof that such a municipal policy of retaliation exists. Respondent must also prove that the "policy of retaliation"—and not some other factor, such as his relationship with his supervisors—was the "moving force" in the alleged injury. *Polk County v. Dodson*, 454 U.S. 312 (1981). *See City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1121 (1987) (O'Connor, J., dissenting), noting that the connection between an alleged municipal policy of inadequate police training and the misconduct of an officer in a particular matter appeared to be "largely a matter of speculation and conjecture."

As the nature of the decision in this case does not demonstrate that the decision represents policy, the *second* issue is whether the status of the decisionmaker makes the City responsible.

> [M]unicipal liability under § 1983 attaches where —and only where—a deliberate choice to follow a course of action is made from among various alternatives by the *official*[*s*] . . . *responsible for establishing final policy with respect to the subject matter in question.*

Pembaur, 106 S. Ct. at 1300 (emphasis added).

The Court, in *Pembaur*, emphasized that it is not enough simply to find that one of the municipal actors in question had some "policymaking authority." The court must also find that the official in question had authority to make municipal policy with respect to the decision or action in question. In fact, the Court in *Pembaur* anticipated virtually the exact situation presented in this case and explained why there is no municipal responsibility:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability."

Pembaur, 106 S. Ct. at 1300, n.12.

In the present case, respondent's supervisors clearly were not acting in a policymaking capacity with respect to the personnel decisions at issue. They classified their decisions as "minor reorganizations" which did not require the attention of high level officials. Obviously, their decisions did not create a rule of general application for future implementation.

There is no evidence that the City officials delegated their authority to make employment policy to the supervisors involved in respondent's transfer and layoff.[8] Indeed, the record suggests that the supervisors engaged in conduct inconsistent with City policy, as demonstrated by four decisions of the Civil Service Commission reversing the decisions of the supervisors. Pet. App. A-23.

All that is established by the record is that respondent's supervisors exercised their discretion to hire, transfer, or discharge individual employees in a manner that was found by the jury to be retaliatory. Pet. App. A-9. But this Court clearly has distinguished such *discretionary* conduct within an official's delegated authority from policymaking conduct:

> The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise

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[8] The theory that respondent's supervisors were establishing City policy by their actions in this case plainly is incompatible with the fact that their personnel decisions repeatedly were reversed by the Civil Service Commission.

> to municipal liability based on an exercise of that discretion.

Pembaur, 106 S. Ct. at 1299. In the absence of proof of policymaking authority on the part of the supervisors in question and proof that City policy was either implemented or established in their treatment of respondent, the City of St. Louis cannot be held liable under Section 1983 for the acts of these supervisory employees.[9]

The Eighth Circuit failed to apply the analysis of policymaking set forth above. Instead, the court held it sufficient that the officials' actions were (1) within their delegated authority and (2) immune from *de novo* review. Pet. App. A-8 to A-11. As discussed below, such a theory is plainly inconsistent with the prior decisions of this Court. Moreover it is wholly unfaithful to the underlying theory of municipal liability under Section 1983.

At the outset, imposing municipal liability in those situations where a supervisor acts within an area of delegated authority, *i.e.*, within the scope of his employment, significantly expands a City's exposure to liability under Section 1983. Cities can *only* operate through their agents and employees and therefore, they must delegate authority in order to conduct their business. Thus, the first element of the court of appeals' test, imposing municipal liability for the acts of employees within their delegated authority, is nothing more than *respondeat superior* liability. *Tuttle,* 105 S. Ct. at 2433.

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[9] By adopting a definition of policy that restricts the concept to upper level officials, this Court has not immunized local governments from liability for constitutional violations by mid-level employees. But liability for the acts of such employees is warranted only when those employees are engaged in a practice that has attained the status of a municipal custom. For the reasons stated pp. 19-20, *infra,* it is clear that respondent's rights were not violated because of any custom of the city to retaliate against municipal employees for exercise of their First Amendment rights.

Under the Eighth Circuit's test for unconstitutional policy, virtually any action that is taken by a city employee constitutes city policy unless the action clearly is *ultra vires.* Such an approach to determining what constitutes municipal policy for purposes of Section 1983 liability not only undermines the normal process of delegation of responsibility, it also undermines the choices of every municipal government's elected officials. Simply stated, the reasoning of the court of appeals converts every municipal employee who makes day-to-day decisions into a policymaker. The clear effect of the rule is to shift financial responsibility for constitutionally impermissible acts from individual wrongdoers to state and local taxpayers through the artificial attribution of "policymaker" status. This results in substantial redistribution of the City's scarce resources. In addition, such a rule improperly dilutes the real policymaking authority of the City's elected officials.

The requirement that the act in question must be "final" adds nothing to the test. The fact that a particular official has discretionary authority necessarily implies that the official has authority to make decisions and take actions that are, in some respects, final. If an action does not constitute the policy of the City, then the simple fact that the action is final cannot convert it into city policy.[10] "[P]olicymaking authority is more than discretion, and it is far more than the final say-so . . . ." *Bennett v. City of Slidell,* 728 F.2d 762, 769 (5th Cir. 1984). A "finality" test is flatly inconsistent with the result in *Tuttle* where a finding of municipal liability was reversed notwithstanding the fact that the respondent's decedent had been killed by the allegedly unconstitutional act of a police officer. Clearly, no act is more "final" than a police officer's use of deadly force. Yet this Court held that the respondent was still required to prove affirmatively that the shooting took place pursuant to an unconstitutional City policy.[11] *Tuttle*, 105 S. Ct. at 2436.

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[10] *See Pembaur,* 106 S.Ct., at 1301 (White, J., concurring) ("not . . . every act of municipal officers with final authority . . . represents the policy of the municipality").

Moreover, a definition of policy that is based on finality interferes with the appropriate functioning of municipal decisionmaking. A rule which requires local government to subject every discretionary act to review by the highest official policymakers, or risk the imposition of liability, will force Cities to alter significantly the decisionmaking process by creating additional layers of mandatory review. Such a system would be reasonable only on the assumption (and contrary to this Court's admonition to use common sense) that supervisory officials regularly violate municipal employees' constitutional rights. *Amici* submit that the relatively infrequent problem of retaliation can best be handled by permitting the injured party to pursue available administrative remedies or, if necessary, recover directly from his supervisor.

Even if the "finality" test were an appropriate measure of municipal "policy," it is clear that liability was unjustifiably imposed by the court below. In considering whether the actions of respondent's supervisors were "final," the court of appeals completely misanalyzed the significance of the role of the Civil Service Commission. The court suggested that the failure of the Commission to review respondent's transfer converted the actions of his supervisors in ordering the transfer into City policy. In other words, the fact that the Commission failed to rule in a manner that the Eighth Circuit believed sufficiently protective of respondent's rights was, as a matter of law, sufficient to prove that respondent's injury fairly could be attributed to a City policy.

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[11] Proof of a single incident of unconstitutional activities is not sufficient to impose liability on a City absent proof that municipal policymakers made a "conscious choice" to adopt the unconstitutional policy. *Tuttle*, 105 S.Ct. at 2436.

However, the significance of the Commission does not lie only, as the court of appeals seemed to assume, in determining whether the actions of the respondent's supervisors were "final." On the contrary, the very existence of the Commission—and its four rulings in favor of respondent—indicates that the City has a policy of protecting employee rights. In the absence of evidence that the Commission is a sham, the existence of the Commission should weigh heavily against a finding of a *policy* of retaliation. *Cf. Pembaur*, 106 S. Ct. at 1301 (White, J., concurring) ("[w]here the controlling law places limits on their authority, [municipal employees] cannot be said to have the authority to make contrary policy").[12]

In sum, the court of appeals ignored the restrictions upon municipal liability intended by Congress and embodied in this Court's decisions in *Monell*, *Tuttle*, and *Pembaur*. The effect of this departure from settled principles will be to expose municipalities to significant liability for actions which cannot reasonably be controlled by even the most extensive, and expensive, efforts of their governments. For these reasons, the court below erred in finding that respondent's injuries stemmed from municipal policy.

B. There Was No Evidence Of A City Custom Or Practice Of Retaliation Against Employees For Exercising Their First Amendment Rights.

Unlike the standard for determining municipal policy, the test for municipal custom typically focuses on the activity of city employees who do not have policymaking authority, such as police officers. In order for a City to be held liable for injury inflicted pursuant to municipal "custom or usage," evidence must be adduced to demonstrate: (1) a common or widespread practice violative of constitutional rights; and (2) constructive or actual knowledge of the practice by city officials who have authority to end the practice.[13] As this Court has recognized in a similar context, custom denotes "persistent and widespread" practices. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167 (1970). The City is held responsible for actions taken pursuant to municipal custom on the theory that the City has acquiesced in the custom.

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[12] Unfortunately, the Civil Service Commission's proceedings have been stayed because of this litigation. By shortcutting the procedures established by the City to set and enforce policy on the issues in question, the respondent has deprived the City of St. Louis of the opportunity to articulate, through its Civil Service Commission, a clear and authoritative statement of City policy.

A single incident cannot create an inference that a widespread practice exists. *See Tuttle*, 105 S. Ct. at 2435; *Kibbe*, 107 S. Ct. at 1115. In order to establish municipal liability on the basis of an unconstitutional custom or practice, respondent must demonstrate a widespread practice violative of constitutional rights *and* constructive or actual knowledge by City policymakers who have authority to end the practice in order that tacit authorization of the unconstitutional practice can be inferred. *See Tuttle*, 105 S. Ct. at 2435; *Kibbe*, 107 S. Ct. at 1115 (O'Connor, J., dissenting); *Wellington*, 717 F.2d at 936; *Languirand*, 717 F.2d at 227-228.

Even if respondent could demonstrate that a widespread practice to inhibit speech exists, he would still have to prove that the custom caused the prohibited conduct in this instance. In other words, respondent would have to show that his supervisors transferred him *because* of the custom or practice of retaliating against protected activity. If their actions were taken for reasons independent of a City custom or practice, the City could not be held liable. *See Kibbe*, 107 S. Ct. at 1120 (O'Connor, J., dissenting).

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[13] *See Languirand v. Hayden*, 717 F.2d 220. 228-229 (5th Cir. 1983) (municipal liability requires proof of widespread practice and tacit authorization or deliberate indifference); *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983) (same).

Under these standards for municipal liability under Section 1983, respondent cannot make a valid claim under the "practice or custom" theory of *Monell*. Respondent presented no evidence beyond his own experience of any putative violations of municipal employees' rights by supervisory retaliation. This record amply supports the conclusion that respondent's experience was personal and aberrational, and the courts below made no factual finding to the contrary. Not only is the record barren of any evidence of widespread retaliatory practices by supervisors; it shows affirmatively that, when policymakers became aware of respondent's problems through his administrative appeals, they took corrective action. Accordingly, respondent may not recover against the City on a theory that a municipal "custom or practice" caused the alleged injury to his constitutional rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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BRIEF

(6)

Supreme Court, U.S.
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No. 86-772

In The

Supreme Court of the United States

October Term, 1986

CITY OF SAINT LOUIS,
Petitioner,
v.
JAMES H. PRAPROTNIK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE CITY OF LITTLE ROCK, ARKANSAS, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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12/4

QUESTIONS PRESENTED

1. Whether principles of causation applicable to actions brought against officials and local governments pursuant to 42 U.S.C. § 1983 differ such that a judgment may be rendered against a local government despite the return of a verdict exonerating the local official who was alleged to have promulgated the unconstitutional policy and acted pursuant to that policy?

2. Whether the failure of a local government to establish an appellate procedure for the review of officials' decisions which does not defer in substantial part to the original decisionmaker's decision constitutes a delegation of authority to establish final government policy such that liability may be imposed on the local government on the basis of the decisionmaker's act alone, when the act is neither taken pursuant to a rule of general applicability nor is a decision of specific application adopted as the result of a formal process?

LIST OF PARTIES

The parties in the Court of Appeals were the City of St. Louis, defendant and appellant, and James H. Praprotnik, plaintiff and appellee.

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No. 86-772

In The

Supreme Court of the United States

October Term, 1986

CITY OF SAINT LOUIS,

Petitioner,

v.

JAMES H. PRAPROTNIK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE CITY OF LITTLE ROCK, ARKANSAS, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE CITY OF LITTLE ROCK, ARKANSAS, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The City of Little Rock, a municipal corporation organized under the laws of the State of Arkansas, is interested in this case to the extent that it can further define what is meant by setting municipal policy. As a political subdivision of a State, the City is not required to obtain consent of the parties in order to file this amicus brief. Sup.Ct.R. 36.4.

SUMMARY OF ARGUMENT

Municipalities should not be subjected to liability under 42 U.S.C. § 1983 for the discretionary decisions of policymakers. Further, an official's decision should not be deemed municipal policy for purposes of § 1983 liability, unless that decision can reasonably be deemed to implement policy for the entire municipality as opposed to setting policy for a single department of the municipality.

ARGUMENT

The respondent herein ("Praprotnik") was laid off from his job with the City of St. Louis. Praprotnik argued, in part, that his job was terminated in violation of his First Amendment rights because he had successfully appealed earlier demotions and disciplinary actions. He obtained a jury verdict of $15,000.00 for this violation. *City of St. Louis v. Praprotnik,* 798 F.2d 1168 (8th Cir. 1986), *cert. granted,* 107 S.Ct. 871 (January 12, 1987).

The City of St. Louis was held liable under 42 U.S.C. § 1983 because it had delegated authority to it supervisors—including certain of Praprotnik's supervisors—to determine which City jobs to eliminate. 798 F.2d at 1176. In short, the Eighth Circuit held that permitting an official to make a discretionary decision within his particular department was the same as setting policy for the entire city. If a particular supervisor's decision results in a constitutional violation, the entire City is liable. It is to this question of scope of the policymaker's authority that this brief is addressed.

Clearly, a municipality is not liable under 42 U.S.C. § 1983 unless a constitutional violation occurs as a result of municipal policy, custom or practice. *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978). The municipal policy must be the moving force behind the constitutional tort. *Polk County v. Dodson,* 454 U.S. 312, 326 (1981). Merely employing a tortfeasor does not subject a municipality to liability since the doctrine of *respondeat superior* does not apply. *Pembaur v. City of Cincinnati,* — U.S. —, 106 S.Ct. 1292, 1297-98 (1986).

However, there is no clear identification of when the exercise of authority by a policymaker can be equated to officially promulgated municipal policy. *Compare Praprotnik; Jett v. Dallas Independent School District,* 798 F.2d 748 (5th Cir. 1986); *Williams v. Butler,* 802 F.2d 296 (8th Cir. 1986), *cert. pending sub. nom., City of Little Rock v. Williams,* No. 86-1049. The City of Little Rock ("Little Rock") urges the Court to use this case to state that to be actionable under § 1983 an official's actions must define policy for the entire municipality as opposed to a subdivision—or single department—of the municipality.

In *Pembaur* a plurality of the Court stated that a municipality may delegate discretionary decisions to various municipal officials without designating those officials as final authorities for determining municipal policy.

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. 106 S.Ct. 1300, n.12

Yet, despite this language the Court in *Praprotnik* has taken an entirely different view of when municipal policy is established.

To hold the City of St. Louis liable under 42 U.S.C. § 1983, Praprotnik had to establish that his immediate supervisors had authority to set citywide personnel policy. The Eighth Circuit concluded that his supervisors had this authority because the City permitted them to determine initially which positions within their departments could be abolished because of a lack of work, or a lack of funds. *Praprotnik,* 798 F.2d at 1172. In the Eighth Circuit's view, the request of Praprotnik's supervisors to eliminate his position, even though subject to review, was the equivalent of the City of St. Louis deciding to violate Praprotnik's free speech rights. Hence, permitting a city official to make an initial decision in his area of responsibility, subject to review, is the same as granting that official final authority to establish municipal policy.

The Eighth Circuit has also defined another circumstance in which an official's acts are deemed the equivalent of municipal policy. *Williams v. Butler.* This point is reached when a municipal official, permitted the discretion to hire and fire his employees, illegally terminates an employee—even if that termination is in violation of stated municipal policy. This illegal act of one official is deemed the equivalent of the municipality adopting the illegality as its officially promulgated policy.

The Fifth Circuit, however, has set a different parameter as to when municipal liability attaches. *Jett v. Dallas Independent School District.* According to the Fifth Circuit, the policy maker must have been delegated final authority to make general policy decisions for the municipality as opposed to specific authority in one area. 798 F.2d at 760. It is this view, suggested by *Pembaur,* that Little Rock believes should be adopted. *Praprotnik* provides the Court the vehicle for adopting this view.

To be sure, this bright line test for municipal liability is consistent with the Court's rulings in this area. It is easy to find municipal liability when an officially promulgated policy has resulted in a constitutional violation. *Monell.* There is no doubt in that circumstance that the municipality determined to take a course of action that would result in violating an individual's rights. Hence, the municipality should be held liable.

It is not so clear when the constitutional violation occurs as a result of delegating to a city official authority in a specific area. The question is whether cities should be held liable for the actions of its officials in a specific area if that action is inconsistent with general policy guidelines the city has established? *Pembaur,* as noted above, clearly suggests that to hold a city liable under such circumstances would, in effect, add the doctrine of *respondeat superior* to 42 U.S.C. § 1983.

In today's society, municipalities of any size have to delegate decision making authority to various officials. The municipality should set general guidelines to be followed by those decisionmakers, and it has the right to assume that those guidelines will be followed. It would be absurd to believe that a decisionmaker was executing municipal policy if he acted contrary to that policy. *Pembaur*, 106 S.Ct. 1301-02 (White, J., concurring).

More to the point, it would be absurd to equate an individual decision within a specific department of government to officially promulgated municipal policy absent a stated desire by the municipality to do so. Yet, the City of St. Louis was held liable, in part, because a twice removed supervisor's decision to eliminate Praprotnik's position was deemed the equivalent of a municipal policy to punish those employees that successfully appeal disciplinary actions.

This Court must clearly state that absent a clear indication to the contrary, the acts of municipal officials within their scope of authority do not equate to officially promulgated municipal policy for which § 1983 liability may attach. Until the Court does so, the appellate courts will continue to issue divergent views like those pointed out above.

CONCLUSION

The Court should use this case to clearly delineate when a municipal officials' acts equate to officially promulgated municipal policy. The Court should state that absent a clear delegation of policy making authority for the entire municipality, the decisions of municipal officials, acting within their limited area of authority, do not constitute a basis for municipal liability under 42 U.S.C. § 1983.

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AMICUS CURIAE

BRIEF

1

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No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,
Petitioner,
v.
JAMES H. PRAPOTNIK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AS *AMICI CURIAE* SUPPORTING RESPONDENT

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---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AS *AMICI CURIAE* SUPPORTING RESPONDENT

This brief *amici curiae* is filed with the consent of the parties, as provided for in the rules of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 89 national and international unions with a total membership of approximately 13,000,000 working men and women, many of whom work for state or local governments. The Public Employee Department, AFL-CIO is composed of 30 of the AFL-CIO's affiliated unions with a total membership of some 2,000,000 public employees. These *amici curiae*, and the public employees whom they represent, have a vital interest in the principles that are developed to determine municipal liability under 42 U.S.C. § 1983 for unconstitutional actions visited upon citizens generally and public employees in particular.

STATEMENT OF THE CASE

This case presents yet another occasion for this Court to flesh out the line, first identified in *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691-95 (1978), between those unconstitutional acts by municipal officers and employees for which municipalities may be held liable under § 1983 and those for which municipalities may not be held liable. As the prior decisions[1] reflect, the resolution of particular cases has turned on the precise nature of the challenged conduct and on the municipality's allocation of responsibility for policymaking. It is, accordingly, essential to begin by identifying precisely the conduct at issue in this case, and the rules by which the City of St. Louis has allocated responsibility for making policy with respect to such conduct.

1. Plaintiff (respondent in this Court) is an architect. He had been employed by the City for many years, and at the time of the transfer that triggered this suit was the senior "city planning manager" in the City's Community Development Agency ("CDA") (Pet. App. A2).

In 1980, plaintiff challenged a personnel decision of his superiors in the CDA, and secured a reversal of the decision from the City's Civil Service Commission. Prior to this incident, the formal evaluations of plaintiff's work had been uniformly glowing. In the evaluations following the incident, plaintiff's ratings were reduced, and in particular he was evaluated "inadequate" in "relationships." A confidential memorandum from one of the raters, introduced at trial, disclosed that this evaluation was predicated substantially upon the expressed view of the Director of the CDA, Donald Spaid, that plaintiff was "sabotaging" the CDA, could not be trusted, and ought to be fired (*Id.* A2-A3).

Within a few months of this evaluation, plaintiff was involuntarily transferred from his position as "city planning manager" to a newly-created position in another city agency, the Heritage and Urban Design Division ("HUDD"). Although plaintiff's salary remained the same, his duties in the new position were largely clerical and did not utilize his architectural expertise. It is this transfer that gave rise to the instant lawsuit. (*Id.* A3-A4).

2. To understand the line of responsibility for plaintiff's transfer, it is necessary to review the division of decision-making authority with respect to employment matters in the City of St. Louis. The City Charter, adopted by vote of the residents of the city, contains an Article XVIII captioned "Civil Service." With respect to personnel selections and assignments of the type involved in this case, that article contains one general substantive directive and two specific substantive directives. The general directive is that:

> All appointments and promotions to positions in the service of the city and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be on the sole basis of merit and fitness, which, so far as practicable, shall be ascertained by means of competitive tests, or service ratings, or both [JA 49].

The specific directives are (1) a prohibition on employment discrimination based on "race, political or religious opinions, affiliations or service" (JA 73-74), and (2) a ban on retaliation against employees for refusing to provide political contributions or services (JA 74-75).

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[1] *Monell, supra*; *Owen v. City of Independence*, 445 U.S. 622 (1980); *Polk County v. Dodson*, 454 U.S. 312 (1981); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v. City of Cincinnati*, —— U.S. ——, 106 S.Ct. 1292 (1986).

Article XVIII of the Charter also creates a Civil Service Commission ("CSC") (JA 60-61), which is directed to prescribe "rules for the administration and enforcement of the provisions of this article" (JA 62). Additionally, Article XVIII empowers the CSC to serve as an appellate body resolving appeals challenging personnel actions (JA 63). The powers of the CSC are confined by the following provision entitled "Limitations":

> Except as provided in this section, the commission shall have no administrative powers or duties. Except as so provided, it shall have no power to direct or control any employee of the department of personnel or other employee of the city, or the action to be taken by any of them in any matter or case [JA 64].

Article XVIII further provides for a Director of Personnel (JA 64-65) whose duties include "[t]o pass upon, for compliance with the provisions of the charter and ordinances and . . . rules, and approve or disapprove as to compliance therewith, all . . . transfers, . . . separations, and other employment transactions affecting the status of employes" (JA 67).

As noted, Article XVIII empowers the CSC to make rules "for the administration and enforcement" of that article. The CSC has adopted extensive rules identifying the officials within city government who are to make personnel decisions and the procedures they are to follow, but the CSC's rules do not articulate any limitations on the substantive grounds that such officials may take into account in making personnel decisions of the type involved here. Thus, the CSC's only rule applicable to lateral transfers between departments is the following:

> Transfer of a classified employee from a position under the jurisdiction of one appointing authority to a position under the jurisdiction of another appointing authority may be made with the approval of the Director and the appointing authorities' consent . . . [JA 94].

The phrase "appointing authority" is, in turn, defined (in the City Charter) as any

> persons having power by law or ordinance, or by lawfully delegated authority, to make appointments to any position in the city service [JA 45].

In general, as is true of CDA and HUDD, the "appointing authority" is the director of the city agency.

In the instant case, plaintiff's transfer was initially proposed by Frank Hamsher, who had succeeded Donald Spaid as the Director of the CDA, the agency for which plaintiff worked. The Director of HUDD, the agency to which plaintiff was transferred, and the Director of the Office of Public Safety, the parent agency of HUDD, both agreed to create the new position in HUDD and to transfer plaintiff to that position (Pet. App. A3, A5, A9); the latter individual is a member of the mayor's cabinet (*id.* A7 n.3). The transfer was finally approved by the Director of Personnel who, as noted, is responsible for approving all such personnel actions.

Plaintiff sought to appeal the transfer to the City's Civil Service Commission, but the Commission dismissed the appeal on the ground that lateral transfers without reduction in salary are not reviewable (Pet. App. A4).

3. Plaintiff instituted this action under 42 U.S.C. § 1983, alleging, *inter alia*, that the transfer was prompted by his prior challenge to superiors in CDA and thus violated his First Amendment rights. Named as defendants in the suit were the City; Hamsher, the CDA head who had initiated plaintiff's transfer; Hamsher's successor as Director of CDA; and a CDA employee who had authored the critical evaluation of plaintiff following plaintiff's challenge to a CDA personnel

decision. Spaid, the CDA head who was responsible for the critical evaluation, was not named as a defendant, nor were any of the city officials (apart from Hamsher) who had participated in the transfer decision (Pet. App. A4-A6; JA 12-19).[2]

At the conclusion of the trial on plaintiff's complaint, the jury, although exonerating the individual defendants, returned a verdict in favor of plaintiff against the City "as to the plaintiff's claim against the [City] arising out of the issues of right to free speech and to petition for redress of grievances." The jury awarded plaintiff $15,000 in damages (J.A. 128).[3]

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[2] While plaintiff's suit was pending, plaintiff was laid off from his new job at HUDD, and he amended his complaint to allege that the layoff, too, was improperly motivated. The court of appeals did not reach that issue because it found that the transfer—which relegated plaintiff to a position in which he was unable to utilize his professional skills—was a constructive discharge (Pet. App. A14 & n.8). The City has not challenged that ruling in this Court, and thus no issue is raised here as to the City's liability *vel non* for plaintiff's layoff.

[3] The jury had been charged respecting municipal liability as follows:

> As a general principle, a municipality is not liable under 42 U.S.C. 1983 for the actions of its employees. However, a municipality may be held liable under 42 U.S.C. 1983 if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision.
>
> * * * *
>
> A municipality is liable under 42 U.S.C. 1983 only for a constitutional deprivation pursuant to an unconstitutional governmental custom, usage or official policy knowingly followed by the municipality [JA 113, 115].

The city did not object to these instructions, nor did it challenge them on appeal. The city had proposed an additional instruction that "[a]n isolated incident of illegal conduct" cannot constitute a policy "such as would give rise to liability on the part of a municipality pursuant to 42 U.S.C. 1983," and that such liability requires a showing that the alleged illegal conduct is "systematic" (JA 127). The district court refused to submit that instruction, and the city's

On appeal, the city did not dispute that the First and Fourteenth Amendments forbid lateral transfers in retaliation for an employee's challenging prior personnel actions before a civil service commission, and the court of appeals did not address that question in its opinion. (Pet. App. A12). The city *did* challenge on appeal the adequacy of the evidence to support a finding that the transfer was thus motivated, but the court of appeals rejected that challenge, reasoning that the jury could have found that the critical evaluation of plaintiff was the result of plaintiff's protected activity, and that this evaluation had led to plaintiff's transfer. (*Id.* A12-A14). The appellate court further ruled that:

> (1) the city is liable for the transfer (*id.* A8-A11); and
>
> (2) the jury's verdict against the city is not inconsistent with the jury's exoneration of the individual defendants (*id.* A6-A7 n.3).

The city has brought here only these latter two rulings.

SUMMARY OF ARGUMENT

I. Last Term, in *Pembaur*, this Court elaborated on the rule, first established in *Monell*, that governs the liability of municipalities under 42 U.S.C. § 1983 for the unconstitutional acts of their agents: "[R]ecovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the

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appellate challenge to that refusal was properly rejected on the ground that the requested instruction is inconsistent with this Court's decision in *Pembaur*, *supra*, 106 S.Ct. at 1298-99 (Pet. App. A18).

The test for municipal liability advocated by the city in this Court appears inconsistent with the instructions to which it consented in the trial court. Whether, in these circumstances, the Court will entertain the contention made here by the city is, of course, committed to the Court's discretion. *Compare City of Springfield v. Kibbe*, —— U.S. ——, 107 S.Ct. 1114 (1987), *with Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

municipality has officially sanctioned or ordered." In *Pembaur*, where the wrong consisted of an unlawful invasion of private property by police officers, the Court found the municipality liable only because the intrusion had been directed by the county prosecutor, the person "responsible for establishing final governmental policy respecting such activity," *i.e.*, "the final decisionmaker for the county."

The instant case involves the transfer of a public employee for constitutionally impermissible reasons. The city contends that its liability must be determined by the methodology employed in *Pembaur*, *viz.*, by examining whether the transfer decision was made by the persons responsible for establishing final city policy respecting such employment matters. As we show at pp. 17-23, that methodology would yield the conclusion in this case that the municipality *is* liable. But it is our more basic contention (discussed at pp. 10-16) that that is not the proper approach to determining municipal liability in a case of this type. It is neither necessary nor sound—and would lead to needless complexities and to untoward results—to focus on questions of authority as the means to determining acts "of the government" in a case concerning not *individual* acts of the type involved in *Pembaur* but *institutional* acts of the type involved here.

Pembaur, which involved a trespass by police officers that would have been treated as the act of those individuals alone but for the involvement of a final municipal decisionmaker, is different in kind from cases involving the denial of benefits or privileges that belong to the municipality and that only the municipality can award, *e.g.*, withdrawal of a municipal license or permit, cancellation of a municipal contract, or discharge of a municipal employee. In the latter situations, regardless of whether the municipal actor is a "final decisionmaker," the act inescapably is an act "of the municipality": while the municipality perforce acts through its agents, the acts of the agents in these contexts inflict harm only because of the agents' *official* status, *viz.*, only because the agents are acting for the entity and because the decisions made by the agents are implemented *through the municipality's official processes*. When a public official announces the discharge of a municipal employee for constitutionally impermissible reasons, the announcement would have no significance if the municipality did not accept the discharge as official policy and implement it accordingly. It is the municipality, not the individual decisionmaker, which will remove the victim from its employment rolls, cease paying his salary, and deny him the opportunity to return to his desk and continue the performance of his duties. If a public official has the power to effect the discharge—*viz.*, if the municipality will treat the victim as no longer its employee by reason of the discharge—the municipality has "officially sanctioned" the discharge and thus is responsible for it. The same analysis applies to the transfer held unconstitutional in the instant case: because that transfer was an official act of the city, and was implemented accordingly, the city "officially sanctioned" the decision to transfer plaintiff irrespective of the status of those who decided upon the transfer.

II. In concluding that the jury's verdict against the city is not inconsistent with its verdict exonerating the individual defendants, the court below did not disregard this Court's holding in *City of Los Angeles v. Heller*. The court below correctly understood that decision, but concluded that in this case—where not all who participated in the decisionmaking had been sued, and jury instructions unchallenged by the city had been confused—the jury could consistently find municipal liability albeit exonerating the particular individuals sued. On the question thus presented—whether the court below was correct in its application of *Heller* to these unique facts—the decision below warrants affirmance.

ARGUMENT

I. THE MUNICIPAL LIABILITY ISSUE

A. This case presents a variant of a perennial question: when is an entity—here, a municipal corporation—to be held to have committed, and to be liable for, a legal wrong. Because corporations, unincorporated associations, and other entities are not natural persons, it is always a legal fiction to speak of an entity having acted improperly (or properly for that matter): only human beings—and not entities—are capable of being actors. But it has long been recognized that so long as entities enjoy the benefits of a separate legal status, it is fair and just—and, indeed, often necessary to effective law enforcement—to hold corporations, unincorporated associations and other entities legally responsible for certain acts of their officers, employees and other agents. And a rich body of common law jurisprudence has evolved to define the circumstances in which an entity is to be said to have entered into or breached a contract or to have committed a tort or a crime as the result of the acts of its agents.

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court concluded that in enacting 42 U.S.C. § 1983 as part of the Civil Rights Act of 1871, Congress intended a different rule than the common-law rule of *respondeat superior* for determining the liability of municipalities for constitutional wrongs committed by municipal agents. The Court found in the statutory formulation of the § 1983 cause of action—"[e]very person who . . . subjects or causes to be subjected any citizen . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured"—an intent to define and limit in a unique fashion the responsibility of municipalities for their agents' acts. In particular, the Court determined that:

> Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. [436 U.S. at 691]

Accordingly, municipal liability attaches only

> when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . [*Id.* at 694.] [4]

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[4] While we accept that the line thus drawn in *Monell* controls this case, candor compels us to note our agreement with Justice Stevens' conclusion that the *Monell* line is inconsistent with "the text of 42 U.S.C. § 1983, . . . its legislative history . . . and the holdings and reasoning in several of our major cases construing the statute." *Oklahoma City v. Tuttle*, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting). As Justice Stevens has observed, under *Monell* municipal liability turns on "interpretation of the word 'policy' "—a word that "does not appear in the text of § 1983." *Id.* at 841.

By its terms, § 1983 imposes liability upon a municipality to those whom the municipality "subjects, or causes to be subjected" to a constitutional violation. Because a municipality can "only act through human agents," *id.* at 835, the most natural reading of these words, Justice Stevens has argued, is that "municipalities are liable for the constitutional activities of their agents that are performed in the course of their official duties," *id.* at 842. For "if [a government agent's] relationship with his employer makes it appropriate to treat his conduct as state action for purposes of constitutional analysis, surely that relationship equally justifies the application of normal principles of tort law for the purpose of allocating responsibility for the wrongful state action." *Id.* at 839-40.

Moreover, as Justice Stevens has observed:

> At the time the statute was enacted the doctrine of *respondeat superior* was well recognized in the common law of the several states and in England. An employer could be held liable for the wrongful acts of his agents, even when acting contrary to specific instructions, and the rule had been specifically applied to municipal corporations, and to the wrongful acts of police officers. . . . [W]e have repeatedly held that § 1983 should be construed to incorporate common law doctrine "absent specific provisions to the contrary." . . . [*Id.* at 835-38]

Nor does the legislative history of § 1983 support a contrary conclusion, as Justice Stevens also has demonstrated. The fact that

Just last Term, in *Pembaur v. City of Cincinnati*, —— U.S. ——, 106 S.Ct. 1292 (1986), the Court elaborated on the *Monell* rule. In *Pembaur* the question presented was whether the city could be held liable for an unconstitutional search executed by two law enforcement officers at the specific direction of the county prosecutor. The Court answered that question in the affirmative.

In reaching that conclusion the Court began by explicating the theory of *Monell*:

> The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered. [106 S.Ct. at 1298, emphasis in opinion, footnote omitted.]

Given that theory, the *Pembaur* Court reasoned that "[i]f the decision to adopt [a] particular course of action is properly made by that government's authorized decisionmakers, that surely represents an act of official government 'policy,'" *id.* at 1299, at least where the decisionmaker is "responsible for establishing final governmental policy respecting such activity," *id.* 1299-1300. The fact that a decision is made on an *ad hoc* basis with respect to a particular set of facts and does not establish a generalized rule of conduct is not relevant to the municipal-liability issue, as "government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations." *Id.* at 1299. On that basis, the Court found the county liable for the search executed in *Pembaur* because "[i]n ordering the Deputy Sheriffs to enter petitioner's clinic, the County Prosecutor was acting as the final decisionmaker for the county." *Id.* at 1301.

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the 1871 Congress rejected the Sherman Amendment—which would have "imposed an extraordinary and novel form of absolute liability on municipalities" for the acts of *private* citizens whom the municipality failed to control—"sheds no light" on Congress' intent with respect to the liability of municipalities for the acts of *public employees*. *Id.* at 839. Indeed, that "Congress seriously considered imposing *additional* responsibilities on municipalities without ever mentioning the possibility that they should have any *lesser* responsibility than any other person" impeaches, rather than supports, the *Monell* holding. *Id.* (emphasis in original). *See also Monell*, 431 U.S. at 893 n.57, where the Court, although finding rejection of the Sherman Amendment informative, acknowledged that "[s]trictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees"; *id.* at 706 (Powell, J., concurring).

The city contends that the instant case must be resolved through the same mode of analysis utilized in *Pembaur*, *viz.*, that the decision challenged here must be shown to have been made by an authorized policymaker, who has final decisionmaking authority, in order to attach liability to the municipality. That approach would not avail the city in this case, for as we show *infra* at 17-23, applying that methodology would lead to a determination that the decision here *was* a decision "of the municipality." But as we first show, it is neither necessary nor sound—and would lead to needless complexities and to untoward results—to focus on questions of authority as the means to identifying acts "of the government" in a case concerning not *individual* acts of the type that were involved in *Pembaur* but *institutional* acts of the type involved here.[5]

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[5] We recognize that there is a *dictum* of four Justices in *Pembaur* that implicitly assumes that the methodology employed in the police misconduct cases would be applicable in cases involving the discharge of public employees. 106 S.Ct. at 1300, n.12 (Opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ.). But the issue was not before the Court in *Pembaur*, and none of the

B. In *Pembaur*, as noted, the wrong at issue was the invasion of private property by two individuals conducting a search. The harm was inflicted on the plaintiff in that case by these two individuals and by their acts standing alone. Indeed the very same harm would have been inflicted had the individuals involved not worked for the county; the fact that the men who executed the search were employed by the county converted what would otherwise have been a trespass (if done by private actors) into an unconstitutional search, but did not add to the injury suffered by the plaintiff. In these circumstances, and given *Monell's* rejection of the proposition that every act of a municipal employee within the scope of employment is an act of the municipality, the *only* method available for determining whether the search in *Pembaur* was an "act of the [county]"—as distinguished from an "act of the employees"—was to inquire into the authority of those who committed and those who directed the commission of the search.

The situation is quite different, however, when it comes to decisions respecting the granting or denial of benefits or privileges that belong to the municipality and that only the municipality can award. Only the municipality can in a realistic sense grant, or withdraw, a municipal license or permit, for example; only the municipality can award, or cancel, a municipal contract; and only the municipality can hire, or fire, a municipal employee. Although in these, as in all other instances, the municipality necessarily acts through its agents, the acts of those agents in these respects inflict harm only because of the agents' *official* status; *viz.*, only because the agents are acting *for* the entity and because the decisions made by the agents are implemented *through the municipality's official processes.*

In this setting, we submit, it is beside the point to inquire into the formal authority of the decisionmaker in

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briefs in *Pembaur* suggested, let alone elaborated, the mode of analysis we set forth *infra*.

order to determine whether what is involved is an act "of the municipality." For actions which fall in the category of cases just described are, *by thier very nature*, not mere acts of an individual who is acting on his own, but acts "which the municipality has officially sanctioned or ordered," *Pembaur*, 106 S.Ct. at 1298 and are acts "for which the municipality is actually responsible," *id.*

The discharge of a public employee is of this character. When an unconstitutionally-motivated public official tells a public employee that he is fired, that announcement would have no significance if the municipality did not accept the discharge as official policy and implement it accordingly. The victim is employed by the municipality, not by the individual who decides upon the discharge. It is the municipality, not the individual decisionmaker, which will remove the victim from its employment rolls, cease paying his salary, and deny him the opportunity to return to his desk and continue the performance of his duties. Thus, whether or not the decisionmaker is a policy-making official or is acting under instructions from such an official, if he has the power to effect the discharge—*viz.*, if the municipality will treat the victim as no longer its employee by reason of the discharge—the discharge is an act "of the municipality." The municipality, by treating the victim as no longer its employee, has "officially sanctioned" the act of the wrongdoer in discharging him.

The point is confirmed by a consideration of the remedies to which a wrongfully discharged employee is entitled. Chief among those remedies is reinstatement. But only the municipality is empowered to reinstate an employee. The wrongdoer—assuming he still worked for the city in the same position—might be able to effect that remedy, but any order of reinstatement addressed to the wrongdoer would have to run against him in his *"official capacity,"* for it is only in that capacity that he would have authority to control who is to work for the municipality. And because "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents," *Brandon v. Holt*, 469 U.S. 464, 471-72 (1983), such a judgment necessarily presupposes that the municipality is liable. Thus, if reinstatement is to be part of the appropriate remedy for a wrongful discharge—as this Court has long recognized it to be—the discharge itself must be an act of the employing entity without regard to where the individual who effected the discharge stood in the entity's chain of command.[6]

The same analysis applies to the transfer held unconstitutional in the instant case. When the three agency directors and the Director of Personnel jointly decided to restructure jobs across departmental lines, and to transfer plaintiff to a newly-created job in a different department—decisions that these officials were empowered to make—these decisions were plainly decisions "of the municipality." Plaintiff did not work for these individuals, he worked for the city. By reason of these decisions, the city required plaintiff to report to a new agency, perform the duties of a new job, take directions from new supervisors, and submit to the risk of layoff in a new setting governed by a different seniority system (Pet. App. A4). The city thus "officially sanctioned" the decision to transfer plaintiff.

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[6] There is, of course, no basis for bifurcating remedies and holding a municipality liable to a reinstatement order but not for backpay. As the Court stated in *Monell*:

> Nothing we say today affects . . . the conclusion reached in *City of Kenosha* [*v. Bruno*], see 412 U.S. [507], at 513 [1973], that "nothing . . . suggest[s] that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. [436 U.S. at 701, n.66; *see also*, *id.* at 712 (Powell, J., concurring).]

C. The city would fare no better, however, even if the methodology of *Pembaur* were utilized in this case. For it would remain true in *this* case that the transfer was an "act of the municipality" by virtue of the authority of the decisionmakers.

As we have seen, plaintiff was transferred as the result of a decision made by the heads of three city agencies who are designated "appointing authorities" for the City and have been delegated the authority to make employment decisions.[7] The transfer decision was approved by the Director of Personnel, whose powers, the Supreme Court of Missouri has stated, are "exercised . . . without control of a superior power other than the law." *Kirby v. Nolte*, 164 S.W. 2d 1, 8 (1942). These officials were authorized to act with only the most limited substantive constraints upon the scope of their decisionmaking, *i.e.*, the substantive provisions in the City Charter. The decision they made was final, and not subject to review at any level of the city government. Thus, the decision to transfer plaintiff was made by "the final decisionmaker[s] for the [city], and the [city] may therefore be held liable under § 1983." *Pembaur*, 106 S.Ct. at 1301.

The city's contention that the decision thus made was not "policymaking" by officials vested with the final authority to make that policy rests upon three premises that will not withstand scrutiny. We address each in turn.

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[7] In this respect, St. Louis, like most large cities, differs from school districts in placing the locus of decision-making. In most school districts, decisions respecting the hiring, nonrenewal and discharge of teachers are made by the school board itself. In that setting, where individual employment decisions are made by the legislative body of the entity, this Court's opinions leave no doubt but that such decisions constitute action of the municipality and thus, if unconstitutional, render the municipality liable under § 1983. As the Court stated in *Pembaur*:

> [A] single decision by . . . a [properly constituted legislative] body unquestionably constitutes an act of official government policy. *See, e.g.*, *Owen v. City of Independence*, 445 U.S. 622 (1980) (ctiy council passed resolution firing plaintiff without a pretermination hearing). [106 S.Ct. at 1298.]

1. The city first argues that it is inconsistent with *Monell's* rejection of *respondeat superior* liability to treat the decision of these officials as the act of the municipality. In the city's view, there is no distinction between the "low-level police officer" in *Tuttle*, 471 U.S. at 830 n.5, 831 (concurring opinion of Brennan, J., joined by Marshall and Blackmun, JJ.), and the high-ranking city officials who made the decision in this case (one a member of the mayor's cabinet, another with broad and autonomous powers over personnel matters that are "exercised . . . without control of a superior power other than the law," pp. 5, 17, *supra*). But the difference in the status of the decisionmakers cannot be so cavalierly ignored. What *Monell* disclaimed by its rejection of *respondeat superior* liability was the imposition of municipal liability "solely on the basis of the existence of an employer-*employee* relationship with a tortfeasor," 436 U.S. at 692 (emphasis added); *see also id.* at 691, 693, 694. That relationship was deemed different in kind from "decision[s] officially adopted and promulgated by that body's *officers*," *id.* at 690 (emphasis added), *viz.*, "those whose edicts or acts may fairly be said to represent official policy," *id.* at 694. And as the Court stated in *Pembaur* in words that warrant quoting again:

> [A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's *authorized decisionmakers*, it surely represents an act of official government "policy" as that term is commonly understood. [106 S.Ct. at 1299; emphasis added.]

2. The city next argues that because the City Charter states certain employment policies, and creates a Civil Service Commission, it necessarily follows that no authority to make final employment policy can reside in the officials who acted here.[8] That is a patent *non-sequitur*. "Employment policy" is not an inherently indivisible entity; there are a vast range of employment decisions that a municipality will be called upon to make, and a wide variety of policy questions that can be posed in making even a single employment decision. Some policies (*e.g.*, a prohibition of race discrimination) may be appropriate for city-wide application, while others may be more appropriately fashioned by individual agencies to meet their particular needs. It is not surprising that in a large city like St. Louis the organic law will state *certain* employment policies, while leaving to other city decisionmakers the development of further such policies.

The only substantive employment policies pertinent to job transfers established in the City Charter are that decisions be made on the basis of "fitness and merit" and that there be no discrimination on the basis of race, religion, or participation (or non-participation) in political activity. It can hardly be contended that this exhausts the range of potential policy considerations pertinent to the subject matter that was under consideration here: the transfer of job functions from one city agency to another, the restructuring of a job within the recipient agency, and the involuntary transfer of an employee from one agency to another to fill that job.

To be sure, the City Charter does create a Civil Service Commission. But, that Commission has *not* presumed to adopt additional substantive policies respecting inter-agency lateral transfers, and instead has delegated all substantive authority respecting such transfers to the heads of the agencies involved and the Director of Personnel (*supra*, pp. 4-5); *viz.*, to the very persons who made the decision here. Further, whatever might be the significance of the Commission's authority to entertain *appeals* of personnel decisions when that authority is applicable (see pp. 23-24, *infra*), the Commission ruled in this case that it was *without* authority to entertain an appeal from plaintiff challenging the transfer decision. In sum, the city's governing rules place the final authority for establishing policy respecting inter-agency lateral transfers, beyond the limited policies stated in the City Charter, in the decisionmakers who actually made the decision here.

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[8] The city also argues, of course, that even if these officials could make *some* employment policies, the decision they made here was contrary to a policy set forth in the City Charter and for *that* reason not binding on the city. That is a conceptually different argument from the one we address here, and we deal with it separately at pp. 21-23, *infra*.

The Court in *Pembaur* dealt with a situation in which either of two county officials "could establish county policy under appropriate circumstances," and indicated that the municipality would be liable if *either* had made the decision in question. 106 S.Ct. at 1301. And four Justices observed in *Pembaur*, more generally:

> [L]ike other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. [106 S.Ct. at 1300 (opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ.).]

The city relies upon another passage in the opinion for those four Justices which stated that "if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability" and that this would be true "even if the Board left the Sheriff discretion to hire and fire employees," *id.* at 1300, n.12. But that passage continued: "However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability," *id.* (emphasis in opinion). Nothing in that passage precludes the possibility that a governing body could set certain employment policies itself while delegating to executive officials the authority to set others, and the passage clearly stands for the proposition that where such is the case the decisions of the delegateee within the scope of the delegation "*would* represent [municipal] policy and could give rise to municipal liability."

3. Finally, the city contends that in this case the City Charter establishes a policy with which the transfer decision conflicts, *viz.*, that personnel decisions "shall be on the sole basis of merit and fitness." That declaration, the city contends, left no room for the agency heads and Director of Personnel to decide upon and implement a policy which based a transfer on the fact that the employee in question had challenged his superiors. For two reasons, that contention is without merit.

First, whatever might be the significance under *Monell* of a policy in the city's organic law so specific that it clearly and unambiguously prohibited municipal agents from taking particular actions that they nonetheless proceeded to take (*e.g.*, a command that no personnel decisions be motivated by race), a generalized declaration that personnel decisions should be based on "merit and fitness" is not of that character, at least in the run of cases. A declaration that broad leaves an all but unlimited scope for interpretation of a kind that itself constitutes "policymaking."[9] And the power to make such policy necessarily will be placed in some final decisionmaker—in this instance, those who made the decision to transfer plaintiff.

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[9] Those who authorized the City Charter well understood that the "merit and fitness" provision would not impose meaningful con-

The city's brief suggests that it is inconceivable that an employee's criticism of his superiors to the Civil Service Commission could be deemed to bear on his "merit and fitness" to continue working under those superiors (Pet. Br. 29). But that proposition is by no means self-evident. *See, e.g., Pickering v. Board of Education,* 391 U.S. 563, 570 n.3 (1968). Here, the officials empowered to make the final decision for the city respecting the transfer of plaintiff *did* believe that his challenge to his superiors bore upon his "merit and fitness"; the formal evaluation of plaintiff—which was prepared to measure those very qualities—was downgraded in the category of "relationships" because of his challenge.

Moreover, if generalized declarations such as the "merit and fitness" provision in St. Louis' City Charter could exonerate municipalities from the consequences of the decisions made by their high-ranking officials, Congress' establishment of municipal liability in § 1983 would be rendered nugatory: every municipality could insulate itself from liability for all acts of its designated policymakers by the simple injunction in its organic law: "do right, not wrong,"—or, more precisely, "do not violate the federal constitution." Indeed, under the city's thesis even decisions of the *city council* would not create municipal liability in the face of such a command.

The consequence of the city's argument would thus be to vitiate the "central aim" of § 1983: to make whole

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straints upon delegated policymakers; the inclusion in the Charter of *specific* prohibitions against discrimination in personnel decisions on the basis of race, religion, and political activity demonstrates that even consideration of *those* factors was not thought adequately foreclosed by the simple injunction that decisions be based on "merit and fitness."

the victims of unconstitutional action, *Owen*, 445 U.S. at 650. As the Court explained in *Owen*:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . . Yet owing to the qualified immunity enjoyed by most government officials, . . . many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated. [*Id.* at 651, footnote omitted.]

The breadth of municipal exoneration sought by the city here, if adopted by the Court, would have consequences even graver than those found unacceptable in *Owen.*

D. Unlike the decision to transfer plaintiff, which was not reviewable by the Civil Service Commission, the later decision to lay-off plaintiff *was* appealable to that Commission.[10] Had the court below ruled the layoff to be an unconstitutional act, and imposed liability upon the municipality therefor, a separate question respecting the meaning of *Monell* would be presented: whether a policy decision is "final" (and thus a proper predicate for municipal liability) although the victim is afforded an appeal, after the injury has begun to be inflicted, to a "quasi-judicial" tribunal of the municipality[11] which does not make a *de novo* decision but instead accords substantial deference to the executive decisionmaker (Pet. App. A11).

That question is *not* presented, however, because the court below did *not* rule the layoff to be an unconstitutional act (see *supra*, p. 6 n.2). The city agrees that this is so (Pet. Br. 11, 15, 32 n.11), and accordingly restricts its discussion of municipal liability to the transfer (*id.* 15-31). There can be little doubt that, if a municipality provided a review mechanism *before* implementing an official's personnel recommendation, liability could not attach to the municipality until the ruling of the reviewing body (for no injury would be suffered prior to that point). It is a much thornier question whether the availability of quasi-judicial review *after* a decision has been implemented and injury has been suffered should preclude municipal liability.[12] Because the issue is not presented in this case, we do not address it.

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[10] Plaintiff filed such an appeal from his layoff, but the CSC has held the appeal in abeyance pending resolution of this lawsuit (Pet. App. A5).

[11] The Supreme Court of Missouri has characterized the Commission's appellate function as "quasi-judicial." *Kirby v. Nolte, supra*, 164 S.W.2d at 10.

II. THE ALLEGEDLY "INCONSISTENT VERDICTS" ISSUE

In *City of Los Angeles v. Heller*, —— U.S. ——, 106 S.Ct. 1571 (1986), this Court held that a jury's verdict exonerating the lone municipal agent alleged to have inflicted a constitutional injury foreclosed the plaintiff from thereafter litigating a claim that the municipality itself was liable:

> This [verdict], it seems to us, was not only conclusive as to Officer Bushey, but also as to the city and its police commission. They were sued only because they were thought legally responsible for Bushey's actions; if the latter inflicted no constitutional injury on respondent, it is inconceivable that petitioners could be liable to respondent. [*Id.* at 1573.]

Invoking *Heller*, the city contends that the jury's verdict against the city was inconsistent with its verdict exonerating the individual defendants.

Critical to the decision in *Heller* was that "[t]he jury was not instructed on any affirmative defenses that might

have been asserted by the individual police officer," *id.* at 1572. As the Court explained:

> Respondent urged, and the Court of Appeals apparently agreed "that the jury could have believed that Bushey, having followed Police Department regulations, was entitled in substance to a defense of good faith. Such a belief would not negate the existence of a constitutional injury" . . . .
>
> *The difficulty with this position is that the jury was not charged on any affirmative defense such as good faith which might have been availed of by the individual police officer.* [106 S.Ct. at 1573, emphasis added.]

Ordinarily, the individual defendants in § 1983 actions assert a qualified immunity defense, and that defense is submitted to the jury. When that occurs, a jury verdict exonerating the individual defendants may mean only that the jury, albeit finding a constitutional wrong, was persuaded that the defendants had established their immunity. There is, accordingly, no inconsistency in such a case between a verdict exonerating the individuals and one holding the municipality liable, for the municipality does not share the individuals' qualified immunity. *Owen, supra.*

In the instant case, plaintiff did not sue all those who participated in the decisions he challenged, and, as the city acknowledges, the instructions to the jury respecting liability of those individuals he *did* sue were "badly bungled" and the court of appeals was "manifestly dissatisfied" with them (Pet. Br. 33, n.12). As there was no objection to these instructions (*id.*), the city cannot escape the consequence of the jury confusion thus engendered—a confusion that the court of appeals concluded might have led the jury to believe it was authorized to exonerate the individuals sued even if it believed a constitutional wrong had been committed (Pet. App. A6-A7 n.3, A14-A15 n.8). It was that potential for confusion that persuaded the court below that *Heller* was inapplicable (*id.*).

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[12] Among other things, the Court would have to take into account its rulings that exhaustion of administrative remedies is not required before instituting suit against a governmental entity for damages under § 1983, *see Patsy v. Board of Regents*, 457 U.S. 496 (1982).

The correctness of the appellate court's application of *Heller* to these facts can have no conceivable relevance to any case arising hereafter. Accordingly, apart from observing that the jurors would have to have been logicians to comprehend the pertinent instructions as a whole (or, more precisely, to comprehend that the instructions were impenetrable),[13] we do not explore the issue further.

Were this Court to conclude that the jury's verdicts were inconsistent, a new trial would be required, for there is no way of knowing which way the jury would have ruled if forced to resolve the inconsistency. *Heller*, 106 S.Ct. at 1577 & n.15, and cases cited thereat (Stevens, J., dissenting). That course was not decreed in *Heller*, because there was no inconsistency in jury verdicts in *Heller*: the trial had been bifurcated, the trial of the claim against the individual defendant resulted in a verdict for that defendant, and this Court concluded that in light of that verdict there was no warrant to proceed with a trial against the municipality.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[13] The pertinent instructions appear at JA 110, 114, 118-19, 120-21, 123.